EDITOR'S NOTE

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o. 85-1370-ASX
tatus: GRANTED

ocketed:
ebruary 14, 1986

Title: Arkansas Writers' Project, Inc., Appellant
v.
Charles D. Ragland, Commissioner of Revenue of Arkansas

Court: Supreme Court of Arkansas

Counsel for appellant: Wilson, Anne Owings

Counsel for appellee: Svoboda, Joseph Vincent, Clark, John Steven

ntry	Date	Note	Proceedings and Orders
1	Feb 14 1986	G	Statement as to jurisdiction filed.
2	Mar 19 1986		DISTRIBUTED. April 4, 1986
3	Apr 3 1986	P	Response requested. (Due May 3, 1986 - NONE RECEIVED)
4	Apr 28 1986		Motion of appellee Ragland, Commnr. of Revenue to dismiss filed.
5	Apr 30 1986		REDISTRIBUTED. May 15, 1986
6	May 19 1986		PROBABLE JURISDICTION NOTED.
			**********
7	Jun 12 1986		Record filed.
9	Jun 17 1986		Order extending time to file brief of appellant on the merits until August 2, 1986.
0	Aug 1 1986	G	Motion of City & Regional Magazine Association for leave to file a brief as amicus curiae filed.
1	Jul 31 1986	G	Motion of Time Inc. for leave to file a brief as amicus curiae filed.
2	Aug 4 1986		Joint appendix filed.
3	Aug 4 1986		Brief of appellant AR Writers Project, Inc. filed.
4	Aug 1 1986	G	Motion of Magazine Publishers Association for leave to file a brief as amicus curiae filed.
5	Aug 1 1986	G	Motion of Times Mirror Company, et al. for leave to file a brief as amici curiae filed.
6	Aug 1 1986	G	Motion of American Civil Liberties Union Foundation, et al. for leave to file a brief as amici curiae filed.
7	Aug 2 1986	G	Motion of Miami Herald Publishing Company, et al. for leave to file a brief as amici curiae filed.
9	Aug 11 1986		Order extending time to file brief of appellee on the merits until October 2, 1986.
0	Sep 24 1986		Motion of City & Regional Magazine Association for leave to file a brief as amicus curiae GRANTED.
1	Sep 24 1986		Motion of Time Inc. for leave to file a brief as amicus curiae GRANTED.
2	Sep 24 1986		Motion of Magazine Publishers Association for leave to file a brief as amicus curiae GRANTED.
3	Sep 24 1986		Motion of Times Mirror Company, et al. for leave to file a brief as amici curiae GRANTED.
4	Sep 24 1986		Motion of American Civil Liberties Union Foundation, et al. for leave to file a brief as amici curiae GRANTED.
5	Sep 24 1986		Motion of Miami Herald Publishing Company, et al. for leave to file a brief as amici curiae GRANTED.

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. 85-1370-ASX

try	Date	Note	Proceedings and Orders
5	Sep 29 1986		Brief amicus curiae of Maryland filed.
7	Sep 30 1986		Brief amicus curiae of American Samoa, et al. filed.
8	Oct 2 1986		Brief of appellee Ragland, Commnr. of Revenue filed.
9	Oct 28 1986		CIRCULATED.
0	Nov 14 1986		SET FOR ARGUMENT. Tuesday, January 20, 1987. (2no case)
1	Jan 9 1987	X	Reply brief of appellant AR Writers Project, Inc. filed.
3	Jan 20 1987		ARGUED.

Supreme Court, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

85-1370

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

October, 1985

ARKANSAS WRITERS' PROJECT, INC., APPELLANT

V.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS, APPELLEE

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

JURISIDICTIONAL STATEMENT
STATE CIVIL CASE

John R. Clayton
HOUSE, WALLACE, NELSON & JEWELL, P.A.
1500 Tower Building
Little Rock, Arkansas 72201
(501)375-9151

26 pp

PRELIMINARY MATTERS

Question Presented

Did the Arkansas Supreme Court err in finding that a state statute exempting sales of newspaper and certain magazines from a general sales tax, while sales of appellant's magazine are taxed, does not violate the First Amendment rights of the appellant?*

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*The parties to the proceeding in the Arkansas Supreme Court were Arkansas Writers' Project, Inc., Appellant herein, and Charles D. Ragland, Commissioner of Revenue for the State of Arkansas, Appellee herein.

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DESIGNATION OF CORPORATE RELATIONSHIPS

Arkansas Writers' Project, Inc., filing this Jurisdictional Statement as appellant in this proceeding, states that:

A. This is its original Designation of Corporate Relationship.

B. Arkansas Writers' Project, Inc. is not owned by any parent corporation.

C. Journal Publishing, Inc., is a subsidiary of Arkansas Writers' Project, Inc. Arkansas Writers' Project, Inc. does not have an ownership interest in any other subsidiaries other than wholly-owned subsidiaries.

D. The only affiliate of Arkansas Writers' Project, Inc. is Arkansas Business Limited Partnership, an Arkansas limited partnership.

Dated February 10, 1986.

NOTICE OF BELIEF THAT PARTY BELOW LACKS INTEREST IN THE OUTCOME

TO: Joseph F. Spaniol, Jr.
Clerk of the Court

Pursuant to Rule 10.4 of the Rules of the Supreme Court of the United States, you are hereby notified that appellant believes that appellee has no personal interest in the outcome of this appeal. He is the Commissioner of Revenue of the State of Arkansas, and he is named only in that capacity in the Complaint below and in the judgment issued, from which this appeal is taken.

Respectfully submitted,

HOUSE, WALLACE, NELSON & JEWELL, P.A.
1500 Tower Building
Little Rock, Arkansas 72201
(501)3759151

By:/s/ John R. Clayton

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ARKANSAS WRITERS' PROJECT, INC.
APPELLANT

V.

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUE
OF THE STATE OF ARKANSAS,
APPELLEE

JURISDICTIONAL STATEMENT - STATE CIVIL CASE

Question Presented

Did the Arkansas Supreme Court err in finding that a state statute exempting sales of newspapers and certain magazines from a general sales tax, while sales of appellant's magazine are taxed, does not violate the First Amendment rights of the appellant?

Opinions Below

The opinion of the Arkansas Supreme Court entered October 14, 1985, the supplementary opinion on rehearing of the same court entered November 18, 1985, the ruling of the Commissioner of Revenue denying appellant's claim to respond, the opinion of March 29, 1985, and the Order of April 15, 1985 of the Chancery Court of Pulaski County, Arkansas, are set out in the Appendix hereto. The opinion and supplementary opinion of the Arkansas Supreme Court are each reported as *Ragland, Commissioner v. Arkansas Writers' Project, Inc.*, 697 S.W.2d 94 (1985) and 698 S.W.2d 802 (1985), respectively.

Jurisdiction

This action for state sales tax refund, declaratory judgment, and injunctive relief draws in question the validity of Arkansas Statutes Annotated Section 84-1904(f) and 84-1904(j) on the ground that the exemption of newspapers and certain magazines from general sales tax, while the magazine published by appellant is subject to general sales tax, is reugnant to the freedom of speech and freedom of the press clauses of the First Amendment to the Constitution of the United States. The "newspaper exemption" in Section 84-1904(f) exempts sales of newspapers from the general sales tax. The "magazine exemption" in Section 84-1904(j) exempts "religious, professional, trade and sports journals and/or publications printed and published within this State...when sold through regular subscriptions." The appellant's magazine, *Arkansas Times Magazine,* is a general interest monthly magazine. It is not a newspaper, nor is it a religious, professional, trade or sports publication.

The federal constitutional questions were timely raised by appellant when appellant petitioned the appellee, who is the Commissioner of Revenue for the State of Arkansas, for a refund of sales tax paid on sales of its general interest monthly magazine, *Arkansas Times Magazine,* and appellant has continuously raised the issues on appeal. On April 15, 1985, the Chancery Court of Pulaski County, Arkansas, without considering the constitutional issues, ruled in favor of appellant, construing the "magazine exemption" contained in *Ark. Stat. Ann.* §84-1904(j) to exempt all publications printed and published within the state. Since the ruling was based on a statutory construction, the court did not consider the constitutional issues. On October 14, 1985, the Arkansas Supreme Court reversed, finding, first, that the "newspaper exemption" did not apply, since *Arkansas Times* is not a newspaper, and, second, that the lower court's construction of *Ark. Stat. Ann.* §84-1904(j) was incorrect, and that only religious, professional, trade and sports publications were exempt. The court incorrectly stated that the constitutional issues had not been raised. On petition for rehearing, which brought the constitutional issues to the court's attention, the Arkansas Suprme Court issued a supplemental opinion upholding the validity of the statutes exempting newspapers and certain magazines from the sales tax and the imposition of sales tax on sale of *Arkansas Times.* Notice of appeal to the U.S. Supreme Court was timely filed on February 10, 1986.

The jurisdiction of the U.S. Supreme Court to review this decision of the Supreme Court of Arkansas on appeal is conferred by 28 U.S.C. Section 1257 (2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 43 L.Ed.2d 328, 95 S.Ct. 1029 (1975); *Mills v. Alabama,* 384 U.S. 214, 16 L.Ed.2d 484, 86 S.Ct. 1434 (1966).

Constitutional and Statutory Provisions

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

The first clause of the second sentence of the Fourteenth Amendment of the United States Constitution provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States..."

Ark. Stat. Ann. §84-1904 exempts from the Gross Receipts Tax (Sales Tax) imposed (by *Ark. Stat. Ann.* §84-1903) on all sales of tangible personal property numerous items, including:

> "...(f) Gross receipts or gross proceeds derived from

the sale of newspapers...
"(j)...religious, professional, trade and sports journals and/or publications published and printed within this State...when sold through regular subscriptions."

Statement of the Case

This is an appeal from a decision of the Arkansas Supreme Court upholding the validity of two exemptions from the Arkansas Gross Receipts Tax. One exemption exempts newspapers, and the other exemption exempts religious, sports, professional and business journals when sold through regular subscriptions. Other publications are not exempt.

The appellant, Arkansas Writers' Project, Inc., an Arkansas corporation, publishes *Arkansas Times Magazine,* a general interest monthly magazine with circulation of approximately 25,000. Under the Arkansas Supreme Court's ruling, appellant must pay sales tax on sales of *Arkansas Times,* even though sales of newspapers and sports, religious, business, etc. magazines are exempt from tax.

Arkansas Times publishes many articles of the same type appearing in newspapers and in religious, sports, professional and trade journals. It competes with such publications for sales of advertising. Distribution of *Arkansas Times,* through subscriptions and over-the-counter sales, is identical with other publications. Its postage rates are the same. The frequency of publication of magazines may be weekly or less often. Newspapers are generally published daily, weekly or bi-weekly, but may be published less frequently. The method of production of all publications is similar.

This litigation commenced in 1980 when the Arkansas Commissioner of Revenue, the appellee herein, performed a sales tax audit on appellant. Appellant contested the assessment through the administrative process, including a court appeal. Appellant and appellee settled the case in September, 1982, and appellant agreed to pay sales tax, subject to a right to raise the issue again if there were a change in the law or a court ruling bringing into question

the validity of the tax exemption structure.

In 1983, this Court ruled in *Minneapolis Star & Tribune Company v. Minnesota Commissioner of Revenue,* 460 U.S. 575, 75 L.Ed.2d 295 (1983), that a Minnesota use tax on paper and ink used in the production of newspapers which exempted the first $100,000 annually for paper and ink was unconstitutional.

Following this decision, on January 20, 1984, appellant, in accordance with proper administrative procedure, brought a claim for refund of taxes paid after October, 1982. It claimed (1) that the "magazine exemption" should be construed to exempt sales of *Arkansas Times*; and (2) that taxation of sales of *Arkansas Times* when sales of newspaper and other magazines were exempt from tax violated appellant's First Amendment rights. Appellee, acting within his jurisdiction, denied the claim for refund. Appellant pursued a proper appeal to the Pulaski Chancery Court. The Chancery Court interpreted the "magazine exemption" to include all sales of *Arkansas Times,* and thus did not reach the constitutional issues. Appellee appealed to the Arkansas Supreme Court, which held in its opinion of October 14, 1985 that the Chancery Court had erred in its construction of the "magazine exemption" statute, and that the "magazine exemption" did not exempt sales of *Arkansas Times,* but applied only to religious, sports, professional and trade journals. The Arkansas Supreme Court did not, however, consider the constitutional issues which had been continually raised. On petition for rehearing, the Arkansas Supreme Court issued a supplementary opinion on November 18, 1985, considering the constitutional issues and finding that the taxation of sales of *Arkansas Times* was constitutional, in spite of the fact that sales of newspapers and other magazines were exempt from sales tax.

In discussing appellant's argument that the imposition of tax on sales of *Arkansas Times,* while sales of newspapers and other magazines were exempt from taxation, infringed upon appellant's freedom of speech and of the press, the Arkansas Supreme Court distinguished the *Minneapolis Star* case and another case relied upon by appellant, *Grosjean v. American Press Co.*, 297 U.S. 233, 80 L.Ed. 660 (1936), on the basis that the tax in each case

was a special tax applicable only to newspapers, while the tax in issue in this case is a general sales tax applicable to sales of all items not specifically exempt. The Arkansas Supreme Court considered the tax in this case to be an "ordinary form of taxation" for support of the government from which publications are not immune. The court also stated that, since *Arkansas Times* is not exempt from tax, it does not matter to appellant whether the exemption from taxation of other publications is valid or invalid.

The Federal Question is Substantial

The Arkansas Gross Receipts Tax is imposed on appellant's monthly magazine, while newspapers and religious, sports, trade and professional magazines are exempt from tax. The relevant Arkansas exemption statutes cause differential taxation of the press to occur, which is a serious violation of appellant's rights to freedom of speech and of the press.

In *Minneapolis Star & Tribune Company v. Minnesota Commission of Revenues,* 460 U.S. 575 (1983), this Court considered a special use tax on paper and ink consumed by newspaper which exempted the first $100,000 of paper and ink consumed. The tax was imposed in lieu of general sales tax, from which newspapers were exempt. The Minnesota legislature, in imposing the tax, had no impermissible or censorial motive.

This Court found the tax as a whole invalid because it was imposed only in the press, stating:

> "Differential taxation of the press then places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the state asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation."

The Court objected even more strenuously to the exemption for the first $100,000 of paper and ink, stating:

> "When the exemption selects such a narrowly defined group to bear the full burden of the tax the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises."

All but two justices participating in the *Minneapolis Star* case joined in the majority opinion. Mr. Justice White concurred, joining in the portion of the majority opinion dealing wth the $100,000 exemption. On that issue, he stated that the exemption alone was sufficient reason to invalidate the tax, because it limited the burden of the tax to only a few newspapers.

The taxing structure in Arkansas has the same effect, since the legislature has seen fit to exempt all newspapers and many magazines, while other magazines are subject to taxation. Thus, as in *Minneapolis,* only a few publishers are subject to taxation. Particularly in light of the many similarities between newspapers and magazines, there is no rational reason, let alone a "compelling state interest," in distinguishing between the two types of publications.

In summary, the differential system of taxation of periodical publications in Arkansas is a serious violation of appellant's rights to freedom of speech and of the press, and the opinion of the Arkansas Supreme Court is impossible to justify on any reasoned basis and merits swift, summary reversal by this Court.

Conclusion

The decision below upholding the differential exemption from taxation of newspapers and certain magazines should be summarily reversed and sent back for to the Arkansas Supreme Court to award a refund to appellant of taxes paid and to decide whether the exemption of newspapers and certain magazines from taxation should be invalidated or extended to appellant's magazine, and whether appellant should be awarded attorney's fees under 42 U.S.C. §1988. Alternatively, this appeal should be awarded plenary review.

BEST AVAILABLE COPY

Respectfully submitted

HOUSE, WALLACE, NELSON & JEWELL, P.A.
1500 Tower Building
Little Rock, Arkansas 72201
(501)3759151

By: John R. Clayton

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served three copies of the foregoing Jurisdictional Statement on Joseph V. Svoboda, Attorney for appellee, at Department of Finance & Administration, P.O. Box 1272-L, Little Rock, Arkansas, 72201 by placing same in the U.S. mail, first class postage prepaid, this 14 day of February, 1986. There are no other parties to the proceeding.

John R. Clayton

APPENDIX

Ragland, Appellant
v.
Arkansas Writers' Project, Appellee;
Arkansas Supreme Court No. 85-115;
Opinion October 14, 1985

GEORGE ROSE SMITH, J. The appellee, Arkansas Writers' Project, is the publisher of the *Arkansas Times Magazine,* a monthly magazine devoted to matters of general interest. Claiming a tax exemption, the appellee brought this suit for the refund $15,838.22 which it had paid as sales tax on the sale of its magazine during a period of three years. The chancellor held that the sales were tax exempt and ordered a refund. The appeal comes to this court under Rule 29(1)(c).

The sales tax statute, as revised in 1941, contained an exemption for the proceeds from the sale of newspapers. *Ark. Stat. Ann.* §84-1904(f) (Repl. 1980). It also contained an exemption for the proceeds from the sale of advertising space in newspapers and publications and billboard advertising services. §84-1904(j). By Act 152 of 1949 the legislature added to that subsection the following proviso, the proper construction of which is the decisive question in this case:

> Provided, further, that religious, professional, trade and sports journals and/or publications printed and published within this State, shall be exempt when sold through regular subscriptions.

In the trial court it was stipulated that the *Arkansas Times Magazine* is not a newspaper nor a religious, professional, trade, or sports journal. The magazine, however, is printed and published in Arkansas and is sold primarily by mail subscriptions.

The chancellor concluded that in the controlling sentence the words "and/or" have the effect of creating two separate exempt

categories, which he paraphrased in his written opinion as follows: "(1) Religious, professional, trade and sports journals; and (2) publications printed and published within Arkansas." in that view the *Arkansas Times* is a publication printed and published in Arkansas, so that the proceeds from its sale are tax exempt.

We cannot agree with the trial court's conclusion. As we read the sentence, the legislature intended to create not two exemptions but only one, which was fully described. In several opinions we have joined many other courts in condemning the lack of precision in the phrase "and/or." *Boren v. Qualls,* 284 Ark. 65, 680 S.W.2d 82 (1984), citing prior cases. Here we are not persuaded that "and/or" was used to awkwardly divide the whole sentence and create separate exemptions having no apparent basis for their separate existence. We think instead that the lawmakers had a single purpose in mind. That was to exempt the enumerated periodicals if printed and published in Arkansas and sold by subscription and if the particular periodical comes within the term journal or the term publication or the two terms considered together. Under that reading of the statute the *Times* is not exempt, for it is admittedly not a religious, professional, trade, or sports periodical.

We regard the legislative intention as not being open to serious doubt, but even if that were not true our reading of the statute is confirmed by two familiar rules of construction. One, an exemption from taxation is to be strictly construed against the exemption; to doubt is to deny the exemption. *S.H. & J. Drilling Corp. v. Qualls,* 268 Ark. 71, 593 S.W.2d 178 (1980). Two, an interpretation that has long been given to a statute by the executive department will not be disregarded unless it is clearly wrong. *Walnut Grove Sch. Dist. No. 6 v. County Bd. of Education,* 204 Ark. 354, 162 S.W.2d 64 (1942). The Commissioner's Regulation GR-48(E) correctly interprets the statute:

> The gross receipts or gross proceeds derived from the sale of any books, magazines, or publications other than newspapers are subject to the tax; except that religious, professional, trade and sports journals or publications printed and published in Arkansas are exempt when sold through regular subscriptions.

In closing, we add that neither party has questioned the constitutionality of the exemption and that our disposition of the direct appeal makes it unnecessary for us to reach the cross appeal.

Reversed.

Purtle, J., not participating.

Ragland, Appellant
v.
Arkansas Writers' Project, Inc., Appellee;
Arkansas Supreme Court No. 85-115;
Supplementary Opinion on Rehearing;
November 18, 1985

GEORGE ROSE SMITH, J., on rehearing. In our original opinion the decree was reversed on a question of statutory construction. In its petition for rehearing the appellee does not reargue that issue, but it does insist that we should have discussed the constitutionality of the imposition of a sales tax on the sales of the *Arkansas Times Magazine.* That issue was argued by the appellee on its cross appeal, seeking attorney's fees, but the argument was incorporated by reference in the response to the direct appeal and should have been discussed.

The constitutional contention is twofold. It is first said that to exempt certain sports publications from the sales tax but to tax the sales of the *Times* is a denial of equal protection. We need not explore this point, for it would avail the appellee nothing if it wins its argument. The legislature has levied a valid sales tax that is applicable to the *Times.* It is immaterial that an exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that would fall, not the tax against the *Times.* The courts cannot create a tax exemption; that must be done by the legislature. It has not exempted the *Times.*

It is also argued that a tax on the sales of the *Times* is an infringement upon its freedom of speeech and of the press. Two cases are primarily relied upon, but neither addressed the validity of a tax comparable to an ordinary sales tax. *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983); *Grosjean v. American Press Co.,* 297 U.S. 233 (1936). In fact, *Grosjean* supplied the answer to the appellee's contention. The Court said that the owners of newspapers are not immune from any of the "ordinary forms of taxation" for support of the government. That statement applies with even greater force to the *Times,* a monthly magazine publishing matters of general interest. Certainly the *Times* has no greater claims to tax exemptions than has, say, a publisher of books. Both are exercising First Amendment rights, but it would not be seriously argued that they are exempt from income taxes, property taxes, and other exactions levied to pay for the cost of government. No authority has been cited applying a different rule to the sales tax; we are confident that no such authority exists.

We do not reach the cross appeal, for the *Times* is not entitled to an attorney's fee when it loses its case.

The petition for rehearing is denied.

Purtle, J., not participating.

Decision of Arkansas Commissioner of Revenues,
March 9, 1984,
in response to Appellant's claim for refund

The following represents my decision on the claim for refund filed by you on January 20, 1984 on behalf of the captioned taxpayer. In reaching my decision I have carefully considered your brief and the brief of the Department of Finance and Administration.

The claim for refund is predicated on the assertion that *Arkansas Times Magazine* is entitled to an exemption from sales tax under the provisions of *Ark. Stat. Ann.* §84-1904(f) and/or §84-1904(j) and to deny either exemptions will violate the First

and Fourteenth Amendments of the U.S. Constitution.

Your first argument is that *Times Magazine* is in fact a newspaper and therefore should be exempt under §84-1904(f). As a factual matter I find a very definite distinction between "newspapers" and "magazines" and each form a separate classification. Legislative classification is legally permissible and the Fourteenth Amendment only prohibits classification which amounts to invidious discrimination. I do not find that a distinction drawn between newspapers and magazines amounts to invidious discrimination therefore cannot find a violation of the Fourteenth Amendment.

Your have also argued that the Department's interpretation of §84-1904(j) also violates/infringes on the freedom of speech and the press. After considering the case of *Hardin v. Vestal,* 204 Ark. 492, 162 S.W.2d 923, I am of the opinion that the more limited interpretation advanced by the Department of this exemption is legally correct. To agree with *Time's* interpretation, I would be required to find that there was no rational reason for the Arkansas Legislature to specify "religious, professional, trade or sports" publications versus any other publication. I am mindful also of the long line of Arkansas cases which hold that tax exemptions are to be strictly construed against the party claiming same and that to doubt entitlement is to deny the exemption.

I do not agree with the conclusion drawn from the case of *Minneapolis Star* since it ignores the very basic and important distinction. That case involved a specific tax provision on newspapers alone. The tax imposing provision of the Arkansas Sales Tax (*Ark. Stat. Ann.* §84-1903) is on all tangible personal property and makes no express mention of either newspapers or magazines.

Although the foregoing is dispositive of the two arguments advanced in support of the refund, there is a further facet that needs to be addressed. *Times* argues that both of the foregoing exemptions are unconstitutional by virtue of their effect and yet *Times* should be entitled to the benefits thereunder. If both exemptions are unconstitutional I could not grant the refund but rather be required to remove the exemption granted to newspapers under §84-1904(j). The final result would not be to allow a refund to

Times but rather remove the exemption from those numerated classes of publications.

For purposes of the record, I must also point out that I am only able to verify that for the period covered by the refund claim, *Times* paid the amount of $9,153.80 in sales tax rather than $10,809.69.

For the foregoing reasons, the captioned claim for refund is hereby denied. This decision exhausts your administrative remedies under Act 401 of 1979.

It is so ordered this 9th day of March, 1984.

Arkansas Writers' Project, Inc., Plaintiff
v.
Ragland, Defendant;
Pulaski County Chancery Court No. 84-1268
Opinion of Chancellor Bruce T. Bullion,
March 29, 1985

You present the question as to the applicability of the Arkansas Gross Receipts Tax (tax) to the sale of the monthly magazine printed and published in Arkansas by the plaintiff(t). In the process of your arguments you delve into the issues of statutory construction and constitutionality of the tax, and your briefs are of excellent quality. The sections of this law that by this action you ask to be construed are 84-1904(f) and (j). My result requires consideration of, only 84-1904(j) which reads:

> "There is hereby specifically exempted from the tax...the following:...(j) gross proceeds derived from the sales of advertising space in newspapers and publications and billboard advertising services. Provided further, that religious, professional, trade and sports journals and/or publications printed and published within this State shall be exempt when sold through regular subscriptions."

This is a rather long-standing dispute between T and the defendant (DFA), and in 1982 a prior suit between them was settled and dismissed under an agreement that DFA urges, in a mild way, estops T from bringing this action. No part of the tax period involved in that prior action is evolved in the present one, and I do not think that T is any way prevented or hampered to bring this action by that principle, or any other that I know about.

T. argues that the portion of 84-1904(j) that entitles it to the exemption from the tax is the language that reads:

> "...and/or publications printed and published within this State shall be exempt when sold through regular subscriptions."

The stipulated facts established that the monthly magazine of T is printed and published within this State, and that about 80 percent of the monthly sales are to regular subscribers. The remaining 20 percent of its sales are divided between vending boxes similar to those used by newspapers, and sales to retailers for their over-the-counter sale.

DFA argues that the proper interpretation of 84-1904(j) establishes two exempt categories, paraphrased as follows:

> 1) religious, professional trade and sports journals. (emph. added)....; and
> 2) religious, professional, trade and sports publications. (emph. added).

On the other hand T argues that the proper interpretation establishes two exempt categories, paraphrased as follows:

> 1) Religious, professional, trade and sports journals; and
> 2) publications printed and published within Arkansas.

It will be noted that the word "publications" appears twice within this statute; first, in relation to advertising sales and services, and

secondly, in relation to "...publications printed and published within this State...." The construction urged by DFA ignores the language structure of the statute and reorganizes this legislative language in an unwarranted manner. It is sort of like reaching to conclusion, and then dreaming up false premises to try and justify that result. In this process DFA attaches a meaning to the work "journal" that is not reasonable, except perhaps in stilted understandings of former days, i.e., a daily record, or, events written down regularly or as they occur.

In 1981, DFA promulgated its Regulation GR-48 which, among other things, defines certain words used in this section including the word "publication", which is:

> "Any pamphlet, magazine, journal, or periodical, other than a newspaper, designed for the information or entertainment of the general public, or any segment."

That is to say, DFA recognizes, except here, that the words "journal" and "publication" are synonymous, and that both include the term "magazine" within their meaning. To emphasize this, all one needs do is to look at the magazine "ABA Journal - The Lawyers Magazine."

The language of 84-1904(j) very plainly provides that the category:

> "...publications printed and published within this State..."

are exempt from this tax, and I so hold.

DFA has mentioned in its writings that if this construction is reached, that T is not entitled to the claimed refund because all of its sales are not made by subscriptions (only some 23,000 of 28,000), and that there is no evidence to indicate, or prove, the exact amount of the claimed $15,000, plus, wrongfully collected on T's subscription sales. That is to say, DFA advances the argument that in any event T is exempt only on its subscription sales

by virtue of the language in the statute "...when sold through regular subscriptions."

There is a method by which this amount can be reached upon the evidence in this record, but I conclude this is not necessary as the entirety of its sales are exempt. The method available is that it is reflected in the evidence that 80 percent (rounded) of T's sales are by subscriptions, and one need only to take 80 percent of the $15,000 (rounded), and the subscription sales tax is ascertained. But, I conclude that the language "when sold through subscription sales" is descriptive, and not words of limitation. Otherwise, the tax is measured by a method of selling, which is not the scheme of this tax at all, and results in a finding of legislative action little short of frivolous. I reach this result with full consciousness of the well-founded principle that tax exemptions are construed most strongly against the taxpayer, but I conclude that there is no reasonable doubt that requires its application.

The result I have reached makes it unnecessary to consider the constitutional arguments advanced by T, and also the problem of attorney fee award under 42 U.S.C. Sec. 1983/1988. Counsel for T will prepare an appropriate precedent in line with the above finding that the sales of its magazine is specifically exempted from the incidence of this tax and submit a copy to counsel for DFA, for comment, prior to presenting it to me for signature and entry of record. Again I express my thanks to the both of you for your fine help.

Arkansas Writers' Project, Inc., Plaintiff
v.
Ragland, Defendant,
Pulaski County Chancery No. 84-1268
Order of April 15, 1985

On March 29, 1985, the parties came before the Court pursuant to a Stipulation of Facts, Affidavits on behalf of Plaintiff, and Briefs of both parties.

After consideration of the facts presented to the Court, the Court finds:

1. *Arkansas Times Magazine* is a monthly magazine published by Plaintiff in Little Rock, Arkansas.

2. Sales of *Arkansas Times Magazine* are exempted from Arkansas Gross Receipts Tax pursuant to *Ark. Stat. Ann.* §84-1904(j).

3. Plaintiff is entitled to a refund of sales tax paid on sales of *Arkansas Times Magazine* from October 1, 1982, through the present date.

4. The amount of such taxes from October, 1982 through July, 1984 is $15,838.22 and Plaintiff is entitled to a refund of any taxes paid since July, 1984.

5. Plaintiff is entitled pursuant to *Ark. Stat. Ann.* §84-4708 to interest on all overpayments at the rate of 10 percent per annum, and to its court costs in the amount of $39.55.

6. The Defendant should be enjoined from assessing taxes on sales of *Arkansas Times Magazine* in the future.

WHEREFORE, the Court hereby Orders the Defendant to refund the Plaintiff all sales tax on *Arkansas Times Magazine* from October 1, 1982 to the present date, with interest thereon from the date paid by Plaintiff until the date Defendant refunds such taxes, at the rate of 10 percent per annum, and court costs in the amount of $39.55, and the Defendant is permanently enjoined from assessing sales tax on future sales of *Arkansas Times Magazine*.

IT IS SO ORDERED this 15th day of April, 1985.

ARKANSAS SUPREME COURT
NO: 85-115

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUE
APPELLANT

V.

ARKANSAS WRITERS' PROJECT, INC.
APPELLEE

NOTICE OF APPEAL

Notice is hereby given of the appeal by Arkansas Writers' Project, Inc., Appellee, of the judgement of this court of October 14, 1985, as supplemented on rehearing of November 18, 1985, to the United States Supreme Court pursuant to 12 U.S.C. §1257(2) this 12th day of February, 1986.

HOUSE, WALLACE, NELSON & JEWELL, P.A.
1500 Tower Building
Little Rock, Arkansas 72201
(501)375-9151

By:/s/ John R. Clayton
Attorney for Arkansas Writers' Project, Inc.

PROOF OF SERVICE

The undersigned hereby certifies that the foregoing Notice of Appeal was served on Joseph V. Svoboda, Attorney for Charles D. Ragland, Commissioner, at Department of Finance & Adminstration, P.O. Box 1272-L, Little Rock, Arkansas, by plac-

ing same in the U.S. Mail, first class postage paid, this 12th day of February, 1986.

/s/ John R. Clayton

Supreme Court, U.S.
FILED
APR 28 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1370

ARKANSAS WRITERS' PROJECT, INC. ..... *Appellant*

vs.

CHARLES D. RAGLAND, COMMISSIONER
OF REVENUE OF THE STATE OF ARKANSAS ..... *Appellee*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

MOTION TO DISMISS STATE CIVIL CASE

JOSEPH V. SVOBODA
Revenue Legal Counsel
P.O. Box 1272-L
LITTLE ROCK, ARKANSAS 72203
(501) 371-2451

FORMS MANAGEMENT COMPANY

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-1370

ARKANSAS WRITERS' PROJECT, INC. .....*Appellant*

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS .....*Appellee*

ON APPEAL FROM
THE SUPREME COURT OF ARKANSAS

MOTION TO DISMISS STATE CIVIL CASE

APPELLEE'S MOTION TO DISMISS

Appellee, pursuant to Rule 16.1 (d) moves the Court to dismiss the appeal herein or, in the alternative, to affirm the Judgment of the Supreme Court of Arkansas on the ground it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinions and orders in prior court proceedings have been adequately set forth in the Appellant's Jurisdictional Statement and nothing further is added here.

JURISDICTION

Jurisdiction is properly being sought under 28 USC §1257 (2) but Appellee respectfully urges that Appellant's appeal be denied since a decision of this Court is not warranted in this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions upon which Appellant relies, have been set forth on page 3 of Appellant's Jurisdictional Statement. One of those provisions is the Privileges and Immunities Clause. Citation of that clause is evidence of Appellant's pell mell approach in this case. Appellant is a corporation. As such, it has no standing to challenge any law under the Privileges and Immunities Clause. *Western & Southern Life Ins. Co.* v. *State Bd. of Equalization of Calif.*, 451 U.S. 648 (1981); *Hemphill* v. *Orloff*, 277 U.S. 537 (1928).

The Arkansas Gross Receipts (Sales) Tax Act (Ark. Stat. Ann. §84-1901 et seq.) levies a General Excise Tax (by §84-1903) on the gross receipts derived from all sales of tangible personal property, subject only to certain exemptions from tax set forth in Ark. Stat. Ann. §84-1904 which, for the purposes of this appeal, include:

> "(f) Gross Receipts or Gross Proceeds derived from the sale of newspapers . . ."
>
> "(j) Gross Receipts or Gross Proceeds derived from the sale of religious, professional, trade and sports journals and/or publications published and printed within this State and when sold through regular subscriptions."

STATEMENT OF THE CASE

Appellant does not argue that Appellee cannot subject the sale of all tangible personal property to a sales tax under §84-1903. Rather, it contends that the failure to extend the exemptions for newspapers [§84-1904 (f)] and religious, professional, trade and sports publications [§84-1904 (j)], violates Appellant's rights under the First Amendment to the U.S. Constitution. Appellant has stipulated that its publication, Arkansas Times' Magazine, is not a newspaper or a religious, professional, trade or sports publication. Despite arguing that the exemptions under §84-1904 (f) and (j) are unconstitutional, Appellant nevertheless claims entitlement to the same exemptions.

The Arkansas Supreme Court in its November 18, 1985 Supplementary Opinion succinctly disposed of Appellant's constitutional contentions. With respect to the Appellant's claim that to exempt certain publications from sales tax while taxing the sale of others is unconstitutional, the Arkansas Supreme Court stated:

> "We need not explore this point, for it would avail the Appellee nothing if it wins its argument. The legislature has levied a valid sales tax that is applicable to the *Times*. It is immaterial that an exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that would fall, not the tax against the *Times*. The Courts cannot create a tax exemption; that must be done by the legislature. It has not exempted the *Times*."

With respect to Appellant's argument that the tax on the sale of the *Times* is an infringement upon its freedom of speech and of the press, the Arkansas Supreme Court stated:

> "*Grosjean* supplied the answer to Appellee's con-

tention. The Court said that the owners of newspapers are not immune from any of the ordinary forms of taxation for support of the government. That statement applies with even greater force to the *Times*, a monthly magazine publishing matters of general interest. Certainly the *Times* has no greater claim to tax exemptions than has, say, a publisher of books. Both are exercising First Amendment rights, but it would not be seriously argued that they are exempt from income taxes, property taxes and other exactions levied to pay the costs of government. No authority has been cited applying a different rule to the sales tax; we are confident that no such authority exists."

THE FEDERAL QUESTION

Appellant has adroitly intertwined its First and Fourteenth Amendment arguments in recognition of the fact that neither, standing alone, will benefit Appellant to the extent of allowing a refund of the sales tax at issue in this appeal. If in fact there is a differential in taxation by virtue of the exemptions, then the exemptions themselves would be stricken and the sale of Appellant's magazine still subject to the lawfully imposed sales tax. This being an undesired result, Appellant has merged arguments. While setting up the classic argument of different classifications, Appellant advances that as grounds for its First Amendment violation. Appellant has not been subjected to a special tax as was at issue in *Minnesota Star and Tribune Company* v. *Minnesota Commissioner of Revenues*, 260 U.S. 575 (1983). The press is not automatically immune from a general sales tax. *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). Only a special tax which is imposed solely against the press is invalid under the First Amendment according to *Minnesota Star*.

The decision below of the Arkansas Supreme Court did

not approve of, as Appellant claims, a differential system of taxation of publications in Arkansas. What the decision below reflects is that Arkansas imposed a general tax on sales of all items which included all publications save those specifically exempt under Ark. Stat. Ann. §84-1904 (f) and (j). Appellant has admitted its publication does not fall within these two exemptions. Even though the thrust of the Appellant's argument is that the exemptions result in a differential system of taxation on publications and are therefore unconstitutional, Appellant still wants the benefit of the exemptions. If there is any violation of the U.S. Constitution, it is by virtue of the exemptions and therefore the exemptions must fall. ***BUT***, such is not the relief Appellant desires from this Court. Should the exemptions fall, Appellant's publication is still subject to the general sales tax and Appellant's claim for a refund of taxes totally without merit.

CONCLUSION

The Arkansas Supreme Court correctly perceived the issue in this case. Since Appellant admitted its magazine was not within the classes of exempt publications under Arkansas Law, there could not be a refund of taxes as prayed for by Appellant. Due to the lack of a substantial question involving these parties, this appeal should be denied review and Appellee's Motion to Dismiss should be granted.

Respectfully submitted,

JOSEPH V. SVOBODA
Revenue Legal Counsel
P.O. Box 1272-L
LITTLE ROCK, ARKANSAS 72203
(501) 371-2451

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served three copies of the foregoing Motion to Dismiss on John R. Clayton, Attorney for appellant, at House, Wallace, Nelson & Jewell, P.A., 1500 Tower Building, Little Rock, Arkansas 72201, by placing same in the U.S. Mail, First Class, Postage Prepaid, this 24th day of April, 1986. There are no other parties to the proceeding.

/s/ Joseph V. Svoboda

(3)

No. 85-1370

Supreme Court, U.S.
FILED
AUG 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

ARKANSAS WRITERS' PROJECT, INC.,

Appellant,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

JOINT APPENDIX

ANNE OWINGS WILSON
HOUSE, WALLACE, NELSON & JEWELL, P.A.
1500 Tower Building
Little Rock, AR 72201
(501) 375-9151
Counsel for Appellant

JOSEPH V. SVOBODA
Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, AR 72203
(501) 371-2451
Counsel for Appellee

APPEAL DOCKETED February 14, 1986
PROBABLE JURISDICTION NOTED, May 19, 1986

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I. *Chancery Court of Pulaski County, Arkansas*

March	28, 1984	Complaint of Arkansas Writers' Project, Inc.
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August	21, 1984	Plaintiff's Motion for Summary Judgment
August	31, 1984	Defendant's Reply to Plaintiff's Motion for Summary Judgment
October	29, 1984	Order of the Chancery Court of Pulaski County Arkansas granting Plaintiff's Protective Order to review certain of defendant's documents
January	25, 1985	Joint Stipulation
March	29, 1985	Chancery Court's Letter Opinion
April	15, 1985	Order of the Chancery Court of Pulaski County Arkansas
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April	22, 1985	Notice of Cross Appeal by Plaintiff from Order of Chancery Court of Pulaski County, Arkansas

II. *Arkansas Supreme Court*

October	14, 1985	Opinion of Arkansas Supreme Court reversing the Chancery Court of Pulaski County, Arkansas

October	27, 1985	Appellee's Petition for Rehearing
October	28, 1985	Appellant's Response to Petition for Rehearing
November	18, 1985	Arkansas Supreme Court's Supplementary Opinion Denying Rehearing
November	18, 1985	Chancery Mandate Issued
February	12, 1986	Notice of Appeal to United States Supreme Court

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS

ARKANSAS WRITERS' PROJECT, INC.,

Plaintiff,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS,

Defendant.

COMPLAINT

(Filed March 28, 1984)

Comes the Plaintiff, Arkansas Writers' Project, Inc., by its attorneys House, Wallace & Jewell, P.A., and for its appeal from the decision of the Commissioner of Revenues of the State of Arkansas alleges and states:

1. The Plaintiff, Arkansas Writers' Project, Inc., is a corporation organized and existing by virtue of the laws of the State of Arkansas and having its principal place of business in Little Rock, Pulaski County, Arkansas.

2. This Court has jurisdiction of this appeal by virtue of Ark. Stat. Ann. § 84-4726 and the taxpayer's residence in Pulaski County, Arkansas.

3. The Plaintiff, Arkansas Writers' Project, Inc., publishes, distributes and sells the *Arkansas Times Magazine*. These sales take the form of: (a) sales to vendors for resale, (b) sales by subscriptions delivered by mail, and (c) sales through newspaper boxes. All of the above sales should be exempt from liability for sales tax pursuant to Ark. Stat. Ann. § 84-1904(f) and § 84-1904(j), but the Defendant has consistently taken the position that they are not exempt. Furthermore, failure to construe

the exemption provided in Ark. Stat. Ann. § 84-1904(f) and (j) to include sales of *Arkansas Times* violates the Plaintiff's rights under the Arkansas Constitution and the United States Constitution, and is a deprivation of Plaintiff's civil rights actionable under 42 U.S.C. § 1983.

4. The taxpayer has previously (for the years 1979-1982) been assessed Sales Tax liability for its sales of the *Arkansas Times Magazine.* The taxpayer protested the imposition through the stage of filing a Complaint in this Court (Chancery No. 80-4626). The parties settled the lawsuit in August, 1982. As part of the settlement, the taxpayer agreed to pay sales tax on the magazine unless the statute was changed or unless an appellate court issued a ruling affecting the validity of taxing sales of the magazine. It has paid these taxes itself and has not passed them on to its purchasers. These payments were made due to a mistake in the law (see Ark. Stat. Ann. § 84-4726). In March, 1983, the United States Supreme Court issued its opinion in the case of *Minnesota v. Minneapolis Star and Tribune Company,* — U. S. —, 75 L. Ed. 2d 295 (1983). This case stands for the proposition that tax exemptions which discriminate between publications are illegal as being violative of the First Amendment and the Fourteenth Amendment to the United States Constitution.

5. On January 20, 1984, *Arkansas Times* filed its claim for refund with the Defendant asking for a refund of taxes from October 1, 1982, to the present and until resolution of the matter. The matter was heard by the

Commissioner on briefs and affidavits, and on March 9, 1984, the Commissioner issued his ruling that the *Arkansas Times* was not entitled to a tax exemption. It is from this decision that this appeal is made in accordance with Ark. Stat. Ann. § 84-4726.

6. The Defendant's interpretation of the exemptions contained in Ark. Stat. Ann. § 84-1904(f) and § 84-1904(j) discriminates between publications and is therefore illegal under the principles set forth in the *Minnesota v. Minneapolis Star and Tribune Company,* cited in paragraph 4 above. Ark. Stat. Ann. § 84-1904(f) and (j) may be construed in a constitutional manner, and such a construction would allow *Arkansas Times* a sales tax exemption.

7. The taxpayer has exhausted its administrative remedies, and this appeal is proper.

8. This lawsuit is brought pursuant to the Civil Rights Act, 42 USC § 1983, since it is state action infringing the Arkansas Writers' Project's right to freedom of speech and freedom from discrimination granted by Amendments 1 and 14 to the United States Constitution. Therefore, the Plaintiff is entitled to attorney's fees under 42 USC § 1988.

WHEREFORE, the Plaintiff prays for an Order directing the Commissioner to refund to it taxes paid since October 1, 1982, through the date of the refund, with interest, Court costs, and full attorney's fees, pursuant to 42 USC § 1988, a declaratory judgment that sales of *Arkansas Times* are exempt from sales tax, and all other relief to which Plaintiff may be entitled.

Arkansas Writers' Project, Inc.
By Its Attorneys
/s/ Anne Owings Wilson
House, Wallace & Jewell, P.A.
1550 Tower Building
Little Rock, Arkansas 72201
(501) 375-9151

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
4TH DIVISION

ARKANSAS WRITERS' PROJECT, INC.

Plaintiff

VS.

CHARLES D. RAGLAND, COMMISSIONER OF
REVENUE OF THE STATE OF ARKANSAS

Defendant

ANSWER

(Filed April 9, 1984)

Comes the Defendant, Charles D. Ragland, Commissioner of Revenues of the State of Arkansas, by his solicitors, and for his answer to the Complaint of Plaintiff, Arkansas Writers' Project, Inc., states:

(1) That Defendant admits the allegations and statements contained in paragraphs 1 and 2 of the Complaint filed herein.

(2) That Defendant admits that portion of paragraph 3 which states "the Plaintiff, Arkansas Writers' Project, Inc., publishes, distributes and sells the *Arkansas Times Magazine*" and that portion which states that the Defendant has consistently taken the position that the sale of the *Arkansas Times Magazine* is not exempt from the Arkansas Gross Receipts (Sales) Tax but denies each and every other material statement and allegation contained in said paragraph 3 of the Complaint filed herein.

(3) That Defendant admits that portion of paragraph 4 which states "the taxpayer has previously (for the years 1979-82) been assessed sales tax liability for its sales of the *Arkansas Times Magazine*. The taxpayer protested the imposition through the stage of filing a Complaint in this Court (Chancery No. 80-4626). The parties settled this lawsuit in August, 1982. As a part of the settlement, the taxpayer agreed to pay sales tax on the magazine unless the statute was changed or unless an appellate court issued a ruling affecting the validity of taxing sales of the magazine" and that "In March, 1983, the United States Supreme Court issued its opinion in the case of *Minnesota v. Minneapolis Star and Tribune Company*" but denies each and every other material allegation and statement contained in said paragraph 4 of the Complaint filed herein.

(4) That Defendant admits the allegations and statements contained in paragraph 5 of the Complaint filed herein.

(5) That Defendant denies each and every material allegation contained in paragraph 6 of the Complaint filed herein.

(6) That Defendant admits that portion of paragraph 7 which states "the taxpayer has exhausted its administrative remedies" but denies the other statement contained in said paragraph 7 of the Complaint filed herein.

(7) That Defendant denies each and every material allegation contained in paragraph 8 of the Complaint filed herein and, pleading in the affirmative, states that an action brought pursuant to the Civil Rights Act, 42 USC §1983 and 42 USC §1988 lies within the exclusive jurisdiction of the United States Federal Courts and that this Court is without jurisdiction to consider same.

WHEREFORE, having fully answered, Defendant, Charles D. Ragland, Commissioner of Revenues of the State of Arkansas, prays that the Complaint of the Plaintiff, Arkansas Writers' Project, Inc., be dismissed, for his costs expended herein and for all other relief to which he is entitled.

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUES
OF THE STATE OF ARKANSAS
/s/ Joseph V. Svoboda
Attorney for Defendant
P.O.Box 1272-L
Little Rock, Arkansas 72201
(501) 371-2451

CERTIFICATE OF SERVICE

1, Joseph V. Svoboda, certify that I have served a copy of the foregoing Answer upon Anne Owings Wilson, Attorney for Plaintiff, 1550 Tower Building, Little Rock, Arkansas 72201, by placing same in the United States mail, postage prepaid, on this 5th day of April, 1984.

/s/ Joseph V. Svoboda

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No: 84-1268

ARKANSAS WRITERS' PROJECT, INC.

Plaintiff

VS.

CHARLES D. RAGLAND, COMMISSIONER OF
REVENUE OF THE STATE OF ARKANSAS

Defendant

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

(Filed Aug. 21, 1984)

Comes the Plaintiff, Arkansas Writers' Project, Inc., d/b/a Arkansas Times Magazine, and for its Motion for Summary Judgment, states:

1. Attached is an Affidavit which sets forth the relevant facts which would have been presented in a trial of this matter.

2. Such facts conclusively establish that Arkansas Times has been subjected to discriminatory taxation which violates its First and Fourteenth Amendment Rights.

3. Arkansas Times should be exempt from sales taxes pursuant to Ark. Stat. Ann. §84-1904(f), which exempts newspapers, and Ark. Stat. Ann. § 84-1904(j), which exempts "religious, professional, trade and sports journals and/or publications printed and published within this state . . . when sold through regular subscriptions".

4. Defendant has consistently taken a position contrary to the Constitution and the Statutes quoted above, and Plaintiff has been forced to bring this lawsuit to vindicate its Constitutional rights. Defendant's action is "state action" as defined in 42 USC §1983, and Plaintiff is entitled to its costs and attorneys fees pursuant to 42 USC §1988 ("Civil Rights Attorneys Fees Awards Act").

5. This Court is the only Court having jurisdiction over this cause of action, including the §1983 and §1988 claims, because of 28 USC §1341, which states "The [United States] district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state".

WHEREFORE, Plaintiff prays that this Court find that its sales be exempt from Arkansas sales tax; in the alternative that its subscription sales be exempt from sales tax, and that it be awarded a refund of all taxes paid from October 1, 1982 to date of judgment, interest, court costs, attorneys fees, and all other amounts to which Plaintiff may be entitled.

Respectfully submitted,
HOUSE, WALLACE & JEWELL, P.A.
1500 Tower Building
Little Rock, AR 72201
(501) 375-9151
By: /s/ Anne Owings Wilson
Attorneys for Arkansas
Writers' Project, Inc.

AFFIDAVIT

(Filed Aug. 21, 1984)

STATE OF ARKANSAS
COUNTY OF PULASKI

Before the undersigned, Notary Public, duly qualified and acting in and for said county and state, appeared Alan Leveritt, personally known to me to be the affiant herein, who stated the following under oath:

1. My name is Alan Leveritt, my address is P.O. Box 34010, Little Rock, Arkansas, and I am the Publisher for the *Arkansas Times Magazine.* ("Times"), a copy of which is attached.

2. The *Times* is a monthly publication.

3. The *Times* derives receipts from two sources—sales of advertising and sales of copies.

4. The current single-copy price is $1.75 per copy and the current yearly subscription rate (for twelve copies) is $10.95.

5. The *Times* has approximately 23,000 subscribers, sells approximately 5,000 single copies per month through coin-operated stands and to vendors for re-sale over-the-counter.

6. The content and readership of the *Times* are similar to daily newspapers such as the *Arkansas Gazette,* a copy of which is attached. Both contain articles concerning sports, religion, political and social events, etc.

7. The *Times* competes with daily newspapers for the same advertising dollars.

8. The *Times* and daily newspapers make sales to readers through identical channels. These include subscriptions, stand sales and over-the-counter sales.

9. The postage rate for the *Times* and daily newspapers is identical.

10. As publisher of a general interest magazine sold throughout the state, I am familiar with all periodicals published within the state of Arkansas. Most of these publications are newspapers. However, there are a few magazines published in Arkansas. No publication printed inside (or outside) Arkansas is taxed in Arkansas in its subscription or vending machine sales except for *Arkansas Times. Arkansas Times'* economic well-being, and hence its ability to continue publishing contrasting or critical views on politics, religion, sports, and business, is impeded by the imposition of a discriminatory sales tax.

11. The listing of sales tax which the *Arkansas Times* has paid is attached hereto and is a true and correct copy.

IN WITNESS WHEREOF, I have hereunto set my hand this 16th day of August, 1984, in Little Rock, Arkansas.

s/ Alan Leveritt

SUBSCRIBED AND SWORN to before me this 16th day of August, 1984.

/s/ Marilyn Lively

Notary Public

MY COMMISSION EXPIRES:

7-1-91

Date	State Tax	Local Tax	Total Paid to the State
10-82	481.10	72.00	553.10
11-82	622.15	93.37	715.52
12-82	431.27	64.98	496.25
1-83	510.91	79.01	589.92
2-83	264.63	42.06	306.69
3-83	1,103.64	187.70	1,291.34
4-83	433.82	69.58	503.40
5-83	350.26	57.88	408.14
6-83	347.96	57.35	405.31
7-83	404.13	67.74	471.87
8-83	408.13	68.32	476.45
9-83	780.92	131.48	912.40
10-83	935.42	161.14	1,096.56
11-83	1,250.98	164.96	1,415.94
12-83	854.24	116.27	970.51
1-84	834.57	136.41	970.98
2-84	734.72	125.32	860.04
3-84	655.63	116.28	771.91
4-84	570.17	105.33	675.50
5-84	493.21	95.57	588.78
6-84	499.27	85.88	585.15
7-84	655.25	117.21	772.46
	13,622.38	2,215.84	15,838.22

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

Case No. 84-1268

ARKANSAS WRITERS' PROJECT, INC.
Plaintiff

v.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF STATE OF ARKANSAS
Defendant

DEFENDANT'S REPLY TO
PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Comes now the Defendant, Charles D. Ragland, Commissioner of Revenue of the State of Arkansas, and for his reply to the Motion for Summary Judgment of the Plaintiff, Arkansas Writers' Project., Inc., states:

(1) Plaintiff's Motion states that the *Arkansas Times* magazine should be found exempt by the Defendant from Arkansas sales tax pursuant to (1) Ark. Stat. Ann. § 84-1904(f), which exempts newspapers and/or (2) Ark. Stat. Ann. § 1904(j) which exempts religious, professional, trade and sports publications printed and published within this state when sold through regular subscriptions. Plaintiff further contends that by denying either or both of the foregoing exemptions, the Defendant is violating Plaintiff's constitutional rights under the First and Fourteenth Amendment. In support of this Motion, Plaintiff

has attached the affidavit of Allen Leveritt, publisher for the *Arkansas Times* magazine.

(2) That even though Ark. Stat. Ann. § 84-1904(f) exempts only "newspapers", Plaintiff has never stated that the *Arkansas Times* magazine is, in fact, a newspaper. In the original complaint filed in this action, the Motion for Summary Judgment and the affidavit of Allen Leveritt, all that is alleged is that the *Arkansas Times* magazine has certain similarities with daily newspapers. Whether the *Arkansas Times* magazine is a newspaper per se is a material fact to grant the relief prayed by Plaintiff and certainly is a genuine issue as to a material fact still controvert and thus Plaintiff is not entitled to a judgment as a matter of law and a Motion for Summary Judgment under Rule 56 of the Arkansas Rules of Civil Procedure is inappropriate.

(3) Plaintiff has also alleged that the sale of the *Arkansas Times* magazine should be exempt under Ark. Stat. Ann § 84-1904(j) which applies to "religious, professional, trade and sports journals and/or publications printed and published within this state when sold through regular subscriptions". While admitting that the *Arkansas Times* magazine is a publication printed and published within this state and that a portion of its sales, but not all, is sold through regular subscriptions, Defendant has affirmatively denied in his Answer that it is a religious, professional, trade or sports publication. This exemption could only be claimed on the portion of Plaintiff's sales made through regular subscriptions and yet Plaintiff has admitted not all sales on which relief is claimed was made

in this manner. The amount of tax entailed is not known or shown by Plaintiff's pleading. Furthermore, Plaintiff has not stated in the original Complaint, its Motion or in the affidavit of Allen Leveritt that it is a religious, professional, trade or sports publication but rather that it is a monthly publication which contains articles concerning sports, religion, political and social events. Again, the pleadings and affidavit demonstrates the existence of a genuine issue as to a material fact still controverted and thus Plaintiff is not entitled to a judgment as a matter of law under Rule 56 of the Arkansas Rules of Civil Procedure.

(4) Pursuant to the attached affidavit filed on the behalf of the Defendant, Defendant denies the amount of sales tax alleged to have been paid in the affidavit of Allen Leveritt which demonstrates there is a genuine issue as to a material fact still controverted and the Plaintiff is not entitled to a judgment as a matter of law and a Motion for Summary Judgment under Rule 56 of the Arkansas Rules of Civil Procedure is inappropriate.

(5) Plaintiff is alleging entitlement to an exemption from tax and has the burden of proving entitlement beyond all doubt. If there is any doubt then the exemption must be denied to the one claiming it. *Southern Steel and Wire v. Wooten,* 276 Ark. 37, 631 S.W.2d 835 (1982), *Qualls v. Georgia Pacific Corp.,* 269 Ark. 426, 602 S.W.2d 646 (1980).

WHEREFORE, Defendant prays this Court deny Plaintiff's Motion for Summary Judgment and for all relief prayed for in Defendant's Answer filed in this cause of action.

Respectfully submitted

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUE
FOR THE STATE OF ARKANSAS
/s/ Joseph V. Svoboda, Attorney
Office of Revenue Legal Counsel
P.O. Box 1272-L
Little Rock, AR 72203
371-2451

AFFIDAVIT

STATE OF ARKANSAS
COUNTY OF PULASKI

Before the undersigned notary public, duly qualified and acting in and for said County and State, appeared H. Gail Price, personally known to me to be the Affiant herein, who stated the following under oath:

(1) My name is H. Gail Price and I am the manager of the Sales and Use Tax Section for the Revenue Division of the Department of Finance and Administration for the State of Arkansas and have served in such capacity for a period of 11 years.

(2) In my capacity as manager I am responsible for the receipt, review and preservation of all tax reports and payments made under the Arkansas Gross Receipts Tax Act.

(3) The only publications that are exempt from Arkansas Gross Receipts Tax are newspapers and religious, professional, trade and sports publications which are printed and published within this State and sold through regular subscriptions. All other publications sold within the State of Arkansas would be subject to the Arkansas Gross Receipts Tax Act.

(4) According to the records received and maintained by my office, the *Arkansas Times* has not paid Arkansas Gross Receipts Tax in the amount of $15,838.22 during the period October 1982 through July of 1984.

(5) To my personal knowledge the *Arkansas Times* is not the only publication printed and published within Arkansas and sold through regular subscriptions which is taxed under the Arkansas Gross Receipts Tax Act.

IN WITNESS WHEREOF, I have hereunto set my hand this 30th day of August, 1984, in Little Rock, Arkansas.

/s/ H. Gail Price

SUBSCRIBED AND SWORN TO BEFORE ME THIS 30th DAY OF AUGUST, 1984.

/s/ Lisa F. Walker
Notary Public

MY COMMISSION EXPIRES:
1-13-92

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. 84-1268

ARKANSAS WRITERS' PROJECT, INC.

Plaintiff

VS.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUES OF THE STATE OF ARKANSAS

Defendant

JOINT STIPULATIONS

(Filed January 25, 1985)

Comes now the Plaintiff, Arkansas Writers' Project, Inc., and the Defendant, Charles D. Ragland, Commissioner of Revenues of the State of Arkansas, by their attorneys, and jointly stipulate to the following facts in this cause of action:

STIPULATION I: The Arkansas Times Magazine is a general interest magazine that is printed and published monthly in the State of Arkansas and is sold through mail subscriptions, coin operated stands and to vendors for re-sale over-the-counter.

STIPULATION II: The Arkansas Times Magazine is not a "newspaper" nor a "religious, professional, trade or sports journal".

STIPULATION III: Defendants allows for an exemption from Arkansas Gross Receipts (Sales) Tax for only "newspapers" and excludes magazines from the tax exemption contained in Ark. Stat. Ann. §84-1904(f).

STIPULATION IV: Defendants allows for an exemption from Arkansas Gross Receipts (Sales) Tax for only "religious, professional, trade and sports journals which are printed and published within Arkansas when such journals are sold through regular subscriptions" and excludes general interest magazines regardless of where printed, published and whether sold through regular subscriptions from the exemption contained in Ark. Stat. Ann. §84-1904(j).

STIPULATION V: The Plaintiff claims the interpretation by the Defendant of the exemptions contained in Ark. Stat. Ann. §84-1904(f) and (j) violates the Plaintiff's First and Fourteenth Amendment rights under the U. S. Constitution in that it discriminates between different types of magazines and also between newspapers, as one type of publication and all other periodicals.

STIPULATION VI: During the period covered by Plaintiff's request for refund of sales tax paid, Plaintiff has paid Defendant the sum of $15,838.22.

STIPULATION VII: The parties submit this case to the court upon the pleadings, briefs, this joint stipulation and reserve the right to a future hearing, if necessary, in order for the court to hear testimony concerning the amount of attorneys' fees under 42 USC §1988 to the Plaintiff.

ARKANSAS WRITERS'
PROJECT, INC.
/s/ Anne Owings Wilson

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUES
FOR THE STATE OF ARKANSAS
By: /s/ Joseph V. Svoboda

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. 84-1268

ARKANSAS WRITERS' PROJECT, INC.

Plaintiff

VS.

CHARLES D. RAGLAND, COMMISSIONER OF
REVENUE OF THE STATE OF ARKANSAS

Defendant

NOTICE OF APPEAL
AND
DESIGNATION OF RECORD

(Filed April 18, 1985)

Notice is hereby given that defendant, Charles D. Ragland, Commissioner of Revenues for the State of Arkansas, appeals to the Supreme Court of Arkansas from the Decree dated and entered in this action on April 15, 1985. This case is among those over which jurisdiction was reserved by the Supreme Court in Rule 29(1)(c) of the Rules of the Supreme Court because it involves an interpretation or construction of an Act of the General Assembly.

Appellant designates as the record on appeal the entire record, including all pleadings, stipulations, orders, decrees and other documents filed in the court file.

The transcript has been ordered from Bill McFarland, Fourth Division Chancery, Pulaski County Courthouse, Little Rock, Arkansas 72201, Court Reporter of the proceedings in this case.

GIVEN THIS 16th DAY OF APRIL, 1985.

CHARLES D. RAGLAND
COMMISSIONER OF REVENUE
FOR THE STATE OF ARKANSAS

By: /s/ Joseph V. Svoboda
Attorney for Defendant

IN THE CHANCERY COURT OF
PULASKI COUNTY, ARKANSAS
FOURTH DIVISION

No. 84-1268

ARKANSAS WRITERS'
PROJECT, INC.

Plaintiff

VS.

CHARLES D. RAGLAND, COMMISSIONER OF
REVENUE OF THE STATE OF ARKANSAS

Defendant

NOTICE OF CROSS APPEAL

(Filed April 22, 1985)

Notice is hereby given that Plaintiff, Arkansas Writers' Project, Inc., hereby appeals from the Decree dated and entered on April 15, 1985, and particularly from the Court's refusal to consider the issue of awarding attorneys' fees to Plaintiff pursuant to the Civil Rights Attorneys Fees Statute (42 U.S.C. § 1988).

Appellee/Cross-Appellant designates as the record on appeal the entire record, including all pleadings, stipulations, orders, decrees and other documents filed in the court file, all of which have been designated and ordered by Appellant.

Given this 22 day of April, 1985.

HOUSE, WALLACE,
NELSON & JEWELL, P.A.
1500 Tower Building
Little Rock, AR 72201
BY: /s/ Anne Owings Wilson
Attorney for Plaintiff

IN THE SUPREME COURT OF ARKANSAS

NO: 85-115

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUES

Appellee

VS.

ARKANSAS WRITERS' PROJECT, INC.

Appellant

PETITION FOR REHEARING

(Filed October 27, 1985)

This Petition For Rehearing is filed by the Appellee/Cross Appellant, Arkansas Writers' Project, Inc., referred to as *Arkansas Times*. In its opinion, the Court states ". . . neither party has questioned the constitutionality of the [tax] exemption . . ." This statement is wrong. The Court has apparently overlooked many of the major arguments made by both sides in this proceeding.

In addition, the Court stated ". . . our disposition of the direct appeal makes it unnecessary for us to reach the cross-appeal." This statement is also incorrect, as the cross-appeal was based on the constitutional arguments and not on the points considered by the Court.

Arkansas Times brought this case for refund of sales taxes paid because the Commissioner of Revenues taxed sales of its magazine, while sales of newspapers and certain types of magazines (religious, sports, professional and trade journals) were exempted. It had two primary arguments, first, that discrimination against one type of publication and in favor of another was unconstitutional

because violative of free speech, free press and equal protection, and second, that one of the sales tax exemptions could be construed to include sales of *Arkansas Times*.

The Chancellor in the Court below construed that exemption to include *Arkansas Times,* and found it unnecessary to rule on the constitutional issues. The Commissioner of Revenues appealed from the decision of Chancellor below, and the *Arkansas Times* cross-appealed, giving timely notice of such cross-appeal, on the grounds that it was entitled to attorneys' fees because its constitutional civil rights had been violated.

This Court found that the court below was wrong in its statutory construction, and that the proper construction would not exempt sales of *Arkansas Times. Arkansas Times* will not reargue this point. However, this Court then made the statements quoted above, apparently overlooking the facts that the constitutional issues were raised and extensively briefed and argued at every phase of this litigation, including before this Court, and that the cross-appeal was based upon the constitutional arguments. The *Arkansas Times* is entitled to have the constitutional issues and its cross-appeal considered, and that is why this Petition For Rehearing is made.

Respectfully submitted,

/s/ Anne Owings Wilson
Attorney for Appellee/
Cross-Appellant

IN THE SUPREME COURT OF ARKANSAS

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS

Appellant

ARKANSAS WRITERS' PROJECT, INC.

Appellee

NO. 85-115

APPELLANT'S RESPONSE TO PETITION FOR REHEARING

(Filed October 28, 1985)

Appellee's Petition violates Supreme Court Rule 20(e) and should be denied.

Appellee alleges this Court was in error in finding " . . . neither Party has questioned the constitutionality of the (tax) exemption" and " . . . our disposition of the direct appeal makes it unnecessary for us to reach the cross-appeal." Appellee argues that various constitutional issues were in fact raised and since the cross-appeal is based on constitutional arguments, the cross-appeal must be considered.

Appellant agrees that the record reflects numerous references to constitutional rights. However, when these references are considered *in context* of the entire record, it is obvious that at no point in the proceedings was the constitutionality of the statute per se questioned or placed at issue. Appellee merely argued Appellant's interpretation and application of the tax exemption statute resulted in the abridgement of various constitutional rights of the Appellee and not that the statute itself was unconstitu-

tional. It is easy to see why the Appellee framed its arguments in the posture that the interpretation violated constitutional rights rather than the statute itself being constitutionally invalid. If the statute was found to be unconstitutional then there would be no exemption from tax for the sale of *any* magazines and Appellee's refund denied.

Appellee had "no arguments with the Chancellor's statutory construction" (Abstract and Brief of Appellee, p. 2) and only referenced constitutional rights in its cross-appeal as a vehicle to claim entitlement to attorney's fees. Again the constitutionality of the statute itself was not at issue. Furthermore since Appellee has failed to prevail in its action, no attorney fees can be granted under 42 U.S.C. §1983 and the cross-appeal was correctly not considered.

Appellee's Petition should be denied as being derogation of Rule 20(e) and on the merits.

Respectfully submitted,

/s/ Joseph V. Svoboda

Supreme Court, U.S.
FILED
AUG 4 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1370

In The
Supreme Court of the United States
October Term, 1985

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

v.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLANT

ANNE OWINGS WILSON
HOUSE, WALLACE, NELSON & JEWELL, P.A.
1500 Tower Building
Little Rock, Arkansas 72201
(501) 375-9151

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

QUESTION PRESENTED

Did the Arkansas Supreme Court err in finding that a state statute exempting sales of newspapers and certain magazines from a general sales tax, while sales of appellant's magazine are taxed, does not violate the First Amendment rights of the appellant?* **

---

* The parties to the proceeding in the Arkansas Supreme Court were Arkansas Writers' Project, Inc. appellant herein, and Charles D. Ragland, Commissioner of Revenues for the State of Arkansas, appellee herein.

**Designation of Corporate Relationships:

In addition to the corporate relationships designated in the Jurisdictional Statement, the appellant, Arkansas Writers' Project, Inc., has a wholly-owned subsidiary, Southern Writers' Project, Inc., an Arkansas corporation, which is a general partner in Southern Magazine Limited Partnership, an Arkansas limited partnership. This is its Second Designation of Corporate Relationships.

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No. 85-1370

In The
Supreme Court of the United States
October Term, 1985

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

v.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLANT

OPINIONS BELOW

On March 9, 1984, the Arkansas Commissioner of Revenues denied the appellant's claim for tax refund [J.S. 12]. The opinion of March 29, 1985, and the Order of April 15, 1985 of the Chancery Court of Pulaski County,

Arkansas, are set out in the appendix to the Jurisdictional Statement. [J.S. 14-18]. The opinion of the Arkansas Supreme Court entered October 14, 1985, and the supplementary opinion on rehearing entered November 18, 1985 appear in the appendix to the Jurisdictional Statement [J.S. 11-12] and are each reported as *Ragland, Commissioner v. Arkansas Writers' Project, Inc.*, 697 S.W. 2d 94 (1985) and 698 S.W. 2d 802 (1985), respectively.

—o—

JURISDICTION

The jurisdiction of the United States Supreme Court to review this decision of the Supreme Court of Arkansas on appeal is conferred by 28 U.S.C. Section 1257(2). Probable jurisdiction was noted on March 19, 1986.

—o—

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance.

The Equal Protection Clause of the Fourteenth Amendment of the United States Constitution provides:

> "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

Ark. Stat. Ann. § 84-1903, The Arkansas Gross Receipt Act of 1941, provides:

> There is hereby levied an excise tax of three per centum (3%) upon the gross proceeds or gross receipts derived from all sales to any person . . . of the following: (a) Tangible personal property.

Ark. Stat. Ann. § 84-1904 exempts from the Gross Receipts Tax (Sales Tax) imposed (by Ark. Stat. Ann. §84-1903) on all sales of tangible personal property, numerous items, including:

> . . . (f) Gross receipts or gross proceeds derived from the sale of newspapers . . .
>
> (j) . . . religious, professional, trade and sports journals and/or publications published and printed within this state . . . when sold through regular subscriptions.

Ark. Const., Art. 1, § 6 provides in part:

> The liberty of the press shall ever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for abuse of such right.

Ark. Const., Art. 2, § 13 provides:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, conformably to the laws.

42 U.S.C. § 1983 provides in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

STATEMENT OF THE CASE

This is an appeal from a decision of the Arkansas Supreme Court denying appellant's claim for a refund of, and declaratory judgment with respect to, sales taxes assessed on sales of appellant's magazine, *Arkansas Times Magazine*. The appellant claimed that, because sales of other publications are exempt from the Arkansas Gross Receipts Tax under two exemptions, it is also entitled to an exemption. One exemption exempts newspapers, and the other exemption exempts religious, professional, trade and sports journals when sold through regular subscriptions.

The appellant, Arkansas Writers' Project, Inc., an Arkansas corporation, publishes *Arkansas Times Magazine,* a general interest monthly magazine with circulation of approximately 25,000. Under the Arkansas Supreme Court's ruling, appellant must pay sales tax on sales of *Arkansas Times,* even though sales of newspapers and religious, professional trade and sports magazines are exempt from tax.

Arkansas Times publishes many articles of the same type published by those publications which are exempted from the general sales tax. In addition, there are numerous other similarities such as the distribution of the publications by subscription sales, vending machine sales and retail store sales, the method of production, and the frequency in publication. *Arkansas Times* competes with the publications exempted from sales tax for the same advertising dollars, and bears the same costs such as the rates for postage. Yet appellant is required to pay the sales tax which other similar publications are not required to pay.

This litigation commenced in 1980 when the Arkansas Commissioner of Revenue, the appellee herein, performed a sales tax audit on appellant. Appellant contested the assessment through the administrative process, including a court appeal. Appellant and appellee settled the case in September, 1982, and appellant agreed to pay sales tax, subject to a right to raise the issue again if there were a change in the law or a court ruling bringing into question the validity of the tax exemption structure.

In 1983, this Court ruled in *Minneapolis Star & Tribune Company v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983) that a Minnesota use tax on paper and ink used in the production of periodical publications which exempted the first $100,000 annually for paper and ink was unconstitutional. Following this decision, on January 20, 1984, appellant, in accordance with proper administrative procedure, brought a claim for refund of taxes paid after October, 1982. It claimed (1) that the "magazine exemption" should be construed to exempt sales of

Arkansas Times; and (2) that taxation of sales of *Arkansas Times* when sales of newspaper and other magazines were exempt from tax violated appellant's first Amendment rights. Appellee, acting within his jurisdiction, denied the claim for refund. Appellant pursued a proper appeal to the Pulaski Chancery Court, adding a civil claim for damages under the Civil Rights Act of 1964, 42 U.S.C. § 1983. The Chancery Court interpreted the "magazine exemption" to include all sales of *Arkansas Times,* and thus did not reach the constitutional issues. Appellee appealed to the Arkansas Supreme Court, which held in its opinion of October 14, 1985 that the Chancery Court had erred in its construction of the magazine exemption, and that the "magazine exemption" did not exempt sales of *Arkansas Times,* but applied only to religious, sports, professional and trade journals. The Arkansas Supreme Court did not, however, consider the constitutional issues which had been continually raised. On petition for rehearing, the Arkansas Supreme Court issued a supplementary opinion on November 18, 1985, considering the constitutional issues and finding that the application of the sales tax to *Arkansas Times* was constitutional, in spite of the fact that sales of newspapers and other magazines were exempt from sales tax.

In discussing appellant's argument that the imposition of tax on sales of *Arkansas Times,* while sales of newspapers and other magazines were exempt from taxation, infringed upon appellant's freedom of speech and of the press, the Arkansas Supreme Court distinguished the *Minneapolis Star* case and another case relied upon by appellant, *Grosjean v. American Press Company,* 297 U.S. 233, (1936), on the basis that the tax in each case was a

special tax applicable only to newspapers, while the tax in issue in this case is a general sales tax applicable to sales of all items not specifically exempt. The Arkansas Supreme Court considered the tax in this case to be an "ordinary form of taxation" for support of the government from which publications are not immune. The court also stated that, since *Arkansas Times* is not exempt from tax, it does not matter to appellant whether the exemption from taxation of other publications is valid or invalid. Since the Arkansas Supreme Court found that appellant's civil rights had not been violated, it did not consider appellant's 42 U.S.C. § 1983 claim.

SUMMARY OF ARGUMENT

The appellant claims that its First Amendment rights to freedom of speech and the press have been violated by the appellee and that it is entitled to a civil remedy under 42 U.S.C. § 1983. The appellee has imposed a sales tax on sales of appellant's magazine, *Arkansas Times Magazine,* while exempting newspapers and religious, professional, trade and sports publications from taxation. Part I below contains a discussion of the standard of review of state regulatory measures which burden First Amendment rights. Two exemptions from the Arkansas sales tax are at issue, and the effect of these exemptions are discussed at Part II and Part III below. The state court's duty to take jurisdiction over appellant's 42 U.S.C. § 1983 claim is discussed at Part IV.

Part II discusses the effect of what is referred to herein as the "magazine exemption," which appears at *Ark. Stat. Ann.* § 84-1904(j), specifically exempting from the Arkansas sales tax gross proceeds derived from sales of "religious, professional, trade and sports journals and/or publications printed and published within this State, . . . when sold through regular subscriptions." Section B of Part II discusses the invalidity under the First Amendment of a discrimination between publications or speech based on content, relying on *Regan v. Time, Inc.*, 468 U.S. 641 (1984), *Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972) and *Carey v. Brown*, 447 U.S. 455 (1980).

Part III discusses the effect of what is referred to herein as the "newspaper exemption," which appears at *Ark. Stat. Ann.* § 84-1904(f), specifically exempting from the Arkansas sales tax "gross receipts or gross proceeds derived from the sale of newspapers."

Section A of Part III discusses the need for a ruling on the validity of the discrimination between newspapers and magazines; Section B discusses the lack of a rational basis for the discrimination; Section C discusses the vagueness of the definition of "newspaper;" and Section D deals with the targeting of particular publications for taxation in violation of the First Amendment, relying on *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenues*, 460 U.S. 575 (1983).

ARGUMENT

I. A STATE TAXING STRUCTURE WHICH BURDENS FIRST AMENDMENT RIGHTS IS SUBJECT TO STRICT SCRUTINY.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech or of the press." The First Amendment is made applicable to the States by the due process clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652 (1927). These constitutional guaranties are not limited to the dissemination of information and opinion free of charge, but extend equally to commercial sales of literature. *Near v. Minnesota*, 283 U.S. 697 (1931). The appellant is entitled to the First Amendment protections against the abridgement of its freedom of speech and press which results when it is denied tax exemptions which are granted to other publications.

It is settled that speech can be effectively limited by the exercise of the taxing power. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). The appellant's speech was limited by the appellee's withholding of a tax exemption. This is a penalty, exactly the same as a fine imposed for engaging in speech.

Speiser v. Randall, 357 U.S. 513 (1958), dealt with a provision of the California Constitution which required persons claiming a tax exemption to sign a loyalty oath stating they did not advocate the unlawful overthrow of the government. The Court, with only one dissent, found the statute to be an unconstitutional abridgment of freedom of speech. The Court commenced its opinion by stat-

ing: "It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." 357 U.S. at 518.

The Court rejected the argument that a tax exemption was a "privilege" or "bounty" which could be granted or withheld at the whim of the taxing power, stating: "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech." 357 U.S. at 518.

The test to be applied to statutes abridging speech is set forth by the Court as follows:

> When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

357 U.S. at 520.

The Court, without deciding whether California could deny a tax exemption to persons who engaged in unlawful speech, found the denial of an exemption to be unconstitutional because the taxpayer had the burden of proving that no unlawful speech had occurred, rather than the State having an obligation to prove that unlawful speech had occurred. After analyzing at length the particular facts of the case, the Court concluded:

> . . . [W]hen the constitutional right to speak is sought to be deterred by a State's general taxing program, due process demands that the speech be unencumbered until the State comes forward with sufficient proof to

> justify its inhibition. The State clearly has no such *compelling interest* at stake . . . (Emphasis added).

357 U.S. at 529.

The standard which the Court applies when legislation burdens a fundamental right such as freedom of speech and press is the "strict scrutiny" standard. Under the strict scrutiny standard the Court carefully scrutinizes the underlying factual basis of the legislation to determine whether the law is necessary to promote a compelling or overriding interest of government.

In his dissenting opinion in *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575 at 599-600 (1983), Justice Rehnquist stated the basis for governmentally created classifications:

> [A]ll governmentally created classifications must have some 'rational basis' . . .
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> • •
>
> Where the State devises classifications that infringe on the fundamental guarantees protected by the Constitution the Court has demanded more of the State in justifying its action. But there is no *infringement*, and thus the Court has never required more, unless the State's classifications *significantly burden* these specially protected rights. As we said in *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312, 49 L.Ed. 2d 520, 96 S.Ct. 2562 (1976) (per curiam) (emphasis added), 'equal protection analysis requires strict scrutiny of a legislative classification only when the classification *impermissibly interferes* with the exercise of a fundamental right . . . ' . . . (Emphasis is the author's)

And in *Carey v. Brown*, 447 U.S. 455 (1980), the facts of which are described at II.B. below, the Court stated that

"When government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized." 447 U.S. at 461-462.

As discussed more specifically below, strict scrutiny would be applied to the legislative classification in this case, since the imposition of a sales tax on sales of *Arkansas Times* significantly burdens, and thus impermissibly interferes with, appellant's First Amendment rights when other publications are exempt from taxation.

II. THE APPELLEE'S DENIAL OF A TAX EXEMPTION TO APPELLANT WHICH IS AVAILABLE TO PUBLISHERS OF RELIGIOUS, PROFESSIONAL, TRADE AND SPORTS PUBLICATIONS VIOLATES THE FIRST AMENDMENT.

A. There is No Rational Basis For, Let Alone a Compelling Interest in, Denying a Tax Exemption to Sales of a General Interest Magazine Which is Available to Religious, Professional, Trade and Sports Publications.

The appellee has not asserted any compelling interest of government that overrides appellant's fundamental right to freedom of speech and press and protection from discrimination in the exercise of those rights. The factors provided by the appellee as justifications for denying the exemption to sales of *Arkansas Times* would not even satisfy the rational basis test.

The appellee stated in his lower court brief three justifications for discriminating between exempted publications—religious, professional, trade and sports publications —and all other publications.

The first justification asserted by appellee is that the exempted publications are of interest to only a small segment of the population and are not sold in vending boxes or at retail locations, and depend almost exclusively upon subscription sales. However, there is no evidence in the record to support this contention. Even if there were evidence to support this contention, a tax that singles out individual publications within the press places a heavy burden on the State to justify its action. *Minneapolis Star and Tribune Co. v. Minnesota Comm'r. of Revenue,* 460 U.S. 575 (1983). The fact that a publication appeals to a small group rather than the general public is not a reasonable, let alone compelling justification.

The second justification given by the appellee is that the four types of exempt publications have little incentive or opportunity to expand their circulation outside their area of interest. As with the first justification described above, the fact that a publication has limited circulation is not a rational reason for treating it differently than a publication with broader circulation. In fact, the application of a tax only to publications with a large circulation was held to be unconstitutional in *Grosjean v. American Press Company,* 297 U.S. 233 (1936), and the application of a tax only to large publications was held to be unconstitutional in *Minneapolis Star, supra.* Furthermore, to the extent that this justification is based on the limited content of the publication, it is unconstitutional under the First Amendment, as discussed in Section B below.

The final justification given by appellee is that publishers of religious, professional, trade and sports jour-

nals in most cases would be publishing the magazine as a service to its readership rather than as a revenue producer. The statute, however, does not limit the exemption to nonprofit magazines. There is no evidence in the record that religious, professional, trade and sports journals are usually published as a service to their readership and not for profit, and the appellee's contention to that effect is probably incorrect. Particularly in the case of a sports or trade magazine, the publisher is likely to be publishing the magazine as a business venture. All publications, whether or not they are published for profit, provide a service to their readership. *Arkansas Times* provides a service to its readership by providing useful articles of interest on various topics in the same manner a trade or sports journal would provide service to its readership. There is no rational basis for determining that the exempted publications provide a service to their readership while others do not.

The appellee has not even attempted to assert a compelling state interest in the discrimination, and, since there is not even a rational basis for discriminating, the appellee is entitled to the same tax exemption available to other magazines.

B. Discrimination Under the "Magazine Exemption" Violates the First Amendment.

The state has the power to control speech in a public forum through reasonable time, place, and manner restrictions. However, any restrictions must be implemented without regard to the content of the speech; they must serve a significant governmental interest; and they must leave open ample alternative channels for communication

of the information. *Regan v. Time, Inc.* 468 U.S. 641 (1984). The denial of a tax exemption to appellant which is available to other publications which have specified content is unconstitutional.

In *Regan v. Time, Inc.*, 468 U.S. 641 (1984) portions of a federal statute which discriminated between publications based on the content, or purpose, of the publication were declared unconstitutional. The statute, 18 U.S.C. § 474, made it a crime to photograph the currency of the United States. Certain exceptions to the rule appeared in 18 U.S.C. § 504 for illustrations of "philatelic, numismatic, educational, historical, or newsworthy purposes in articles, books, journals, newspapers or albums" as long as the illustrations were black and white, less than three-fourths or more than one and one-half times the size of the original, and the negatives and plates used in making the illustrations were destroyed after their final use. Time, Inc. was advised by Secret Service agents that particular photographic reproductions of currency appearing in its magazine violated Section 474 since they did not comply with the exceptions contained in Section 504. Time continued to use such reproductions. An issue of Sports Illustrated carried a photographic color reproduction of $100 bills pouring into a basketball hoop. A Secret Service agent informed Time of the violation and sought to seize all plates and materials used in connection with the production of the cover.

The court held that Section 504's purpose requirement (the illustration had to be for philatelic, numismatic, educational, historical, or newsworthy purposes) could not be sustained as a valid time, place, or manner restriction because the regulation discriminated on the basis of content,

which violated the First Amendment because there was no compelling interest served by the discrimination. The Court, did, however, uphold the size and color restrictions as valid time, place and manner regulations which were constitutionally permissible. The color and size restrictions effectively served the Government's compeling interest in preventing counterfeiting and did not discriminate between pubications based on content.

Determining that the purpose restriction unconstitutionally discriminated between publications based on the content and subject matter of the speech, the Court stated:

> A determination concerning the newsworthiness or educational value of a photograph cannot held but be based on the content of the photograph and the message it delivers. Under the statute, one photographic reproduction will be allowed and another disallowed solely because the Government determines that the message being conveyed in the one is newsworthy or educational while the message imparted by the other is not. The permissibility of the photograph is therefore often dependent solely on the nature of the message being conveyed. Regulations which permit the Government to discriminate on the basis of content of the message cannot be tolerated under the First Amendment (Citations omitted).

468 U.S. at —, 82 L.Ed.2d at 494.

In *Police Department of Chicago v. Mosely*, 408 U.S. 92 (1972), the Supreme Court determined that a Chicago ordinance exempting only peaceful labor picketing from its general prohibition against picketing in particular areas violated petitioner's right to equal protection of the laws under the Fourteenth Amendment because the ordinance made an impermissible distinction between labor picketing and other peaceful picketing.

The ordinance was challenged by Mosely, a federal postal employee, who had for seven months prior to the enactment frequently picketed a Chicago high school for practicing race discrimination. Mosely, who picketed alone, was always peaceful, orderly and quiet. After the ordinance was passed Mosely was told that if his picketing continued he would be arrested, so he brought action challenging the constitutionality of the ordinance.

The Court found that the classification of picketing was formulated in terms of the subject matter, and there was no appropriate governmental interest suitably furthered by the differential treatment. It stated:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. (Citations omitted) . . . Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'

408 U.S. at 95-96; *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964).

In *Mosely*, the Supreme Court stated:

> [U]nder the Equal Protection Clause, not to mention The First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an equality of status in the field of ideas, and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not pro-

> hibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be justified by reference to content alone.

408 U.S. at 96.

In *Carey v. Brown*, 447 U.S. 455 (1980), the Court invalidated an ordinance which barred all picketing of residences or dwellings, but exempted from its prohibition "the peaceful picketing of a place of employment involved in a labor dispute," on the basis that enforcement of the ordinance violated the Equal Protection rights of members of a civil rights organization who were arrested for picketing on a public sidewalk in front of the mayor's home to protest his failure to support the busing of school children to achieve racial integration.

The appellant in *Carey* attempted to distinguish the ordinance from the one at issue in *Mosely* on the basis that the statute's purpose in *Carey*, to ensure privacy in the home, was a right paramount in the constitutional scheme and more important than the purpose in *Mosely*, which was to maintain quiet and order near schools. The Court did not, however, evaluate whether the State's interest in residential privacy outranked its interest in quiet schools. The Court found that, even given the state's valid interest in residential privacy, "the most legitimate goal may not be advanced in a constitutionally impermissible manner." 447 U.S. at 465. The Court stated that labor picketing was no more deserving of First Amendment protection than public protests over other issues.

In *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984), the Court

upheld an ordinance prohibiting the posting of signs on public property. The prohibition contained no exceptions and therefore did not favor one form of speech over another. Supporters for a political candidate contracted with a sign company to fabricate and post signs with the candidate's name on them. The signs were attached to city utility poles in violation of the ordinance, and city employees removed them. The appellees filed suit alleging that the ordinance abridged their freedom of speech. The Court held that the City's interests in limiting visual clutter and in traffic safety were sufficiently substantial to justify the restriction on expression resulting from the prohibition. The Court stated in *dicta* that if there had been any specific exceptions to the ordinance, it may not have been held to be constitutionally permissible. "To create an exception for appellees' political speech and not these other types of speech might create a risk of engaging in constitutionally forbidden content discrimination." 466 U.S. at 816. A restriction on speech and the press may be valid where it does not discriminate based on content, and invalid where it is unequally applied based on the content of the speech.

The granting or denial of a tax exemption to a magazine under the "magazine exemption" depends solely on the subject matter contained within the publication. A publication containing only religious articles or sports articles is exempt, while a publication containing the same articles along with other articles of general interest, such as historical and political articles, is not. This type of arbitrary distinction based upon the content of a publication cannot be upheld without proof of a compelling state interest.

Arkansas has no compelling interest in disallowing appellant an exemption for its general interest publication while allowing religious, sports, trade and professional publications an exemption. This type of discrimination is unconstitutional on its face. This discrimination cannot be justified as a reasonable time, place and manner restriction because it is based on the subject matter of the speech. Therefore, the denial of a tax exemption to appellant should be declared unconstitutional as an abridgment of appellant's First Amendment rights to freedom of speech and press.

III. THE APPELLEE'S DENIAL OF A TAX EXEMPTION TO APPELLANT WHICH IS AVAILABLE TO PUBLISHERS OF NEWSPAPERS VIOLATES THE FIRST AMENDMENT.

A. Introduction; Need for Ruling on "Newspaper Exemption."

The application of sales taxes to sales of *Arkansas Times Magazine* is also unconstitutional because sales of newspapers are exempted from taxation under *Ark. Stat. Ann.* § 84-1904(f). The application of sales taxes to sales of magazines and not newspapers discriminates between components of the press based partly on the frequency or format of a publication and partly on the content, abridging the First Amendment rights of freedom of speech and of the press of publishers of magazines. A discrimination of this type could only be justified by a "compelling state interest". There is no rational basis, let alone a compelling state interest, in making a distinction between newspapers and magazines in withholding tax exemptions. Further, the appellee's definition of the

term "newspaper" is unconstitutionally vague. Finally, such a distinction is actually based on the content of a publication and proscribed as discussed in Part II above.

Even if the Court rules that the application of the sales tax to sales of *Arkansas Times Magazine* is unconstitutional because religious, professional, trade and sports journals are exempt, it should also consider and rule upon the discrimination caused by the withholding of a tax exemption from sales of magazines as compared to newspapers. The "magazine exemption" could be construed to apply only to subscription sales. *Arkansas Times Magazine* is also sold in vending machines and at retail stores. All sales of newspapers are exempt, regardless of the method of sale. Thus, recognizing appellant's right to be treated the same as religious, sports, professional and trade journals under the magazine exemption might provide only partial relief, still leaving many sales of *Arkansas Times Magazine* subject to taxation while all sales of newspapers are exempt. In addition, the Arkansas Legislature could, in the future, repeal the magazine exemption, leaving unresolved the question of whether a legislature may discriminate between newspapers and magazines in granting tax exemptions.

B. There is No Meaningful Distinction Between Newspapers and Magazines, and Thus No Rational Basis For Discriminating Between Them.

The appellant has stipulated that *Arkansas Times* is a magazine and not a newspaper. (Joint App. p. 21). However, there is no rational basis for discriminating between newspapers and magazines. They are both instru-

ments of the press; they compete for the same advertising dollars; they are distributed through identical channels, by subscription sales, vending machine sales, and retail store sales; they both contain articles on a variety of newsworthy and interesting topics, photographs, and advertising; they have identical mailing rates; the method of production is similar. Newspapers may be issued daily, weekly, bi-weekly, or less often; magazines are usually issued weekly, bi-weekly, monthly, quarterly, annually, or irregularly. Newspapers are usually printed on newsprint and may be black-ond-white or four-color (the trend is toward four-color). Either type of publication may be small or large in cover size, in number of pages, and in circulation. Either may be bound on one side with staples or other fasteners or may be unbound. Even though it may be possible, in some instances, to point to a publication and with some assurance classify it as a newspaper or a magazine, the distinctions are far fewer than the similarities, and there are some publications which would defy definite classification. As discussed in the next section, any rationale for a distinction would have to be based on a theory that newspapers are entitled to favorable treatment because of their content. Therefore, there is no rational basis for differential treatment of newspapers and magazines which is not constitutionally impermissible.

C. The Definition of "Newspaper" Utilized by the Appellee is Unconstitutionally Vague, and is Based Primarily on Content, Which Violates the First Amendment.

The distinction between newspapers and other publications is unconstitutionally vague. As stated in *Time, Inc. v. Regan*, 539 F. Supp. 1371 (1982), aff'd in part,

Regan v. Time, Inc., 468 U.S. 641 (1984), "the definition of a journal, newspaper, or album is anyone's game to play," 539 F. Supp at 1390.

The definitions of "newspaper", "magazine", "journal", and "publication" (all of which are from *Webster's Third New International Dictionary* (Merriam-Webster, 1979), demonstrate, first, that any distinction between newspapers and magazines is unconstitutionally vague, and second, that it would be based primarily on content.

The primary meaning of "magazine" is "a place where goods or supplies are stored," and it also means the items stored in a magazine. Apparently because it referred to a miscellany of items, the word became applicable to "a periodical that usually contains a miscellaneous collection of articles, stories, poems and pictures and is directed at the general reading public."

"Newspaper" is defined as "a paper that is printed and distributed daily, weekly, or at some other regular and usually short interval and that contains news, articles of opinion (as editorials), features, advertising, or other matter regarded as of current interest."

Then there is that hybrid, the "newsmagazine," defined as "a periodical typically published weekly and devoted chiefly to summarizing and analyzing current news." There is also the "journal," defined as "a: a daily newspaper; b: a periodical publication esp. dealing with matters of current interest . . ."; and the "periodical": a magazine or other publication of which the issues appear at stated or regular intervals—usu. used of a publication appearing more frequently than annually but infrequently used of a newspaper." Thus, a "journal" may be a newspaper or a

"periodical," which seems to be synonymous with "magazine"; a "newsmagazine" is a "periodical," but dealing chiefly with news; and a "newspaper" is a "paper" containing news, articles of opinion, and features. A "magazine" has articles, stories, poems and pictures, but the dictionary is silent as to whether the presence of news, editorials, or advertising in a publication also containing stories, pictures, etc. mandates inclusion under the definition of "newspaper," or whether the presence of stories, pictures, etc. in the object comprised of cheap wood pulp paper covered with black ink appearing on the doorstep every morning would cause that object to be considered a "magazine."

The regulations of the Arkansas Department of Finance and Administration (appearing at T. 48-51) define "newspaper" as "a publication in sheet form containing reports of current events and articles of general interest to the public, published regularly in short intervals such as daily, weekly, or bi-weekly, and intended for general circulation." The term "publication" is defined as "any pamphlet, magazine, journal, or periodical, other than a newspaper, designed for the information and entertainment of the general public or any segment thereof."

What these regulations do is to define "newspaper" in a manner similar to the dictionary definition; and then define "publication" as other printed items which are not "newspapers." The indicia of a "newspaper" are either irrelevant (i.e., it must be in "sheet form," whatever that is), facially vague (i.e., it must be published "regularly" in "short intervals," and "for general circulation," whatever those terms may mean), or based on content ("containing reports of current events and articles of general interest") or readership (the "public" and "general circulation"), both of which, as discussed below and in Parts I and II, are classifications which can only be justified by a compelling state interest.

Under both the dictionary definitions and appellee's regulations, there are two distinctions between newspapers and magazines: frequency of publication and content. The regulations establish another distinction, the type of readership. Frequency of publication alone would not establish a category. Although it would be uncommon for a magazine to be issued daily, or a newspaper monthly, it is common for either to be issued weekly or biweekly. The only distinctions which seem to have any weight are, first, whether a publication deals primarily with current news, and, second, whether the publication has a general circulation. Since *Arkansas Times* meets the "circulation" test, the only distinction between newspapers and magazines such as *Arkansas Times* is based on content. As discussed in Part II, above, such a distinction is impermissible under the First Amendment. There is no reason to favor news over articles on philosophy, politics, art or education, or to favor current news over the reasoned analyses of the news which are more likely to appear in magazines.

D. The Selection of Newspapers and Not Magazines for a Tax Exemption Targets Certain Publications Within the Press for Discriminatory Taxation in Violation of the First Amendment.

Even if there were a basis other than content for distinguishing between newspapers and magazines, and even if the distinction were not unconstitutionally vague, the appellee's discrimination between newspapers and magazines would still violate the First Amendment rights of appellant

because it targets certain publications within the press for taxation, while exempting other publications.

In *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue,* 460 U.S. 575 (1983), at issue was a Minnesota use tax imposed on the cost of paper and ink used in producing periodic publications. The first $100,000 of paper and ink consumed in a year was exempt from taxation. The Minnesota Supreme Court upheld the tax, 314 N.W.2d 201 (1981), and this Court reversed. The Court found the tax violated the First Amendment rights of appellant because it singled out the press for special treatment, and because the effect of the exemption was to target only a few of the largest publications to bear the entire burden of the tax.

The Arkansas tax is a general sales tax, applicable to all sales of tangible personal property not exempted under one of the numerous exemptions. Thus, the statute which imposes the tax does not single out the press for special taxation. However, the exemptions target certain elements of the press for favorable treatment, thereby, by omission, targeting other publications for taxation. The effect of exempting newspapers and not magazines is to exempt almost all periodic publications published in Arkansas from taxation, leaving only a very few (and possibly only one, *Arkansas Times*) subject to taxation. Alan Leveritt, the publisher of *Arkansas Times,* stated in the affidavit appearing at p. 13 of the Joint Appendix that he was familiar with magazine publishing in Arkansas and that, to his knowledge, the only magazine in Arkansas which was taxed was *Arkansas Times.* The parties stipulated that if there were other general interest magazines in Arkansas, the Department of Revenue would require them to pay sales tax;

however, there may be only one magazine subject to sales tax.

This Court stated in the *Minneapolis* case:

> [W]e think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme. . . . And when the exemption selects such a narrowly defined group to bear the full burden of the tax, the tax begins to resemble more a penalty for a few of the largest newspapers than an attempt to favor struggling smaller enterprises.
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> * * *
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> A tax that singles out the press, or that targets individual publications within the press, places a heavy burden on the State to justify its action. Since Minnesota has offered no satisfactory justification for its tax on the use of ink and paper, the tax violates the First Amendment, and the judgment below is reversed.

460 U.S. at 592-593.

In *Minneapolis,* the proscribed discrimination was between large and small publications. A similar discrimination was ruled invalid in *Grosjean v. American Press Company,* 297 U.S. 233 (1936). *Grosjean* dealt with a special tax imposed by the Louisiana legislature on advertising receipts of newspapers with a circulation greater than 20,000. The history of the case recited in the Court's opinion indicated that the tax was imposed with a censorial motive, since several of the larger Louisiana newspapers had been critical of Senator Huey Long. The *Minneapolis* decision was not based on *Grosjean* because of this Court's feeling that the *Grosjean* decision depended on the legislature's illicit intent in imposing the tax, and the Court ruled that,

regardless of motive, the discrimination between large and small publications at issue in *Minneapolis* was unconstitutional under the First Amendment.

The instant discrimination is equally unconstitutional, and for the same reasons stated in *Minneapolis*. Just as one cannot divide the general category of "publications" into large and small publications for purposes of discriminating between them, so one cannot divide the category according to frequency of publication, cover size, type of paper, type of binding, or other matters of format, and so discriminate, without violating the rights of the publisher whose publication is accorded the less favorable treatment.

The issue of format-based discrimination was raised in *Regan v. Time, Inc.*, 468 U.S. 641 (1984), the facts of which are described in Part II, Section B. In *Time, Inc.*, the regulation in question prohibited reproduction of U. S. currency except publications for "philatelic, numismatic, educational, historical or newsworthy purposes in articles, books, journals, newspapers, or albums . . ." 18 U.S.C. § 504(1). The Court struck the "purpose" test as being an unconstitutional content-based discrimination. Time, Inc. also claimed that the requirement that the reproductions be in articles, books, journals, etc. was unconstitutional because it was vague and overbroad. However, this Court declined to rule on that issue because there was no evidence or suggestion that Time, Inc. would have difficulty in meeting that requirement. 468 U.S. at —, 82 L.Ed.2d at 495.

This case, on the contrary, does pose that exact question and is brought by a party directly affected by a format-based distinction. Therefore, appellant asks for a definitive ruling that its First Amendment rights are violated by the

discrimination between magazines and newspapers based on format.

IV. THE STATE COURT SHOULD EXERCISE JURISDICTION OVER CLAIMS BROUGHT UNDER 42 U.S.C. § 1983.

The appellant asserted a cause of action under the Civil Rights Act of 1964, 42 U.S.C. § 1983, which provides a civil remedy to a person who is deprived of civil rights by state action. The appellee deprived appellant of its civil rights by denying it a tax exemption in violation of the First Amendment. Neither the trial court nor the Arkansas Supreme Court ruled on the 42 U.S.C. § 1983 action. The trial court ruled in favor of appellant by construing the magazine exemption to be applicable to all sales of *Arkansas Times*, and, therefore, never reached any of the federal causes of action. The Arkansas Supreme Court reversed the trial court's statutory construction and found that the appellant's First Amendment rights had not been violated. Therefore, it did not consider the 42 U.S.C. § 1983 claim. If this Court finds that appellant's First Amendment rights have been violated, it should also find that appellant's 42 U.S.C. § 1983 claim should be considered.

It is a well-established principle that federal and state courts have concurrent jurisdiction over actions brought under federal statutes unless the federal statutes clearly specify otherwise. The primary question in this regard is not whether a state court *may* exercise jurisdiction, as it definitely may, but whether it *must* exercise jurisdiction.

The general rule seems to be that where state and federal courts have concurrent jurisdiction, state courts may only decline jurisdiction under the doctrine of *forum non conveniens,* and then only when there is a legitimate alternate forum. *Kish v. Wright,* 562 P.2d 625 (Utah 1977).

Furthermore, jurisdiction of state and federal courts over cases arising under federal statutes is considered concurrent unless the federal statute clearly grants exclusive jurisdiction to the federal courts. *Dowd Box v. Courtney,* 368 U.S. 502, 508 (1962). In *Dowd Box,* union officers brought an action against an employer in a Massachusetts state court under the Labor Management Relations Act of 1947. Jurisdiction of the state court was questioned because § 301 of the Act provided that suit under the Act "may" be brought in the U.S. District Courts. The U.S. Supreme Court found that state courts were not divested of jurisdiction by the statute, stating ". . . nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law. Concurrent jurisdiction has been a common phenomenon in our judicial history, and exclusive federal court jurisdiction over cases arising under federal law has been the exception rather than the rule." 368 U.S. at 507-508.

The Court further pointed out at n.4, 368 U.S. at 508, that some federal laws can be enforced only in state courts, as in civil actions under federal laws where the amount in controversy is less than $10,000.

With regard to the Civil Rights Act, 42 U.S.C. § 1983, this Act has a jurisdictional statute, 28 U.S.C. § 1343, providing that U.S. District Courts have original jurisdiction of civil rights actions. The U.S. Supreme Court has made it clear that jurisdiction is not limited to the federal courts,

however. In *Martinez v. California,* 444 U.S. 277 (1980), a suit brought under 42 U.S.C. § 1983, the facts of which are not otherwise relevant, the Court stated at n.7, 444 U.S. at 283:

> We note that the California Courts accepted jurisdiction of this federal claim. That exercise of jurisdiction appears to be consistent with the general rule that where
>
> > 'an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court.' (Citations omitted).
>
> We have never considered, however, the question whether a state *must* entertain a claim under § 1983. We note that where the same type of claim, if arising under state law, would be enforced in the state courts, the state courts are generally not (free to refuse enforcement of the federal claim. [Citation omitted]). But see *Chamberlain v. Brown,* 223 Tenn. 25, 442 S.W. 2d 248 (1969)."

In *Chamberlain v. Brown,* the Tennessee Supreme Court did, indeed, find that the courts of Tennessee did not have jurisdiction over a § 1983 claim. The court stated that "no policy of this state can be found in its history, judicial or otherwise, that would require the judicial branch of the government of Tennessee to entertain such action." 442 S.W.2d at 250-251.

In Arkansas, there is abundant evidence of a policy supporting the exercise of jurisdiction in this case. First, the Act of Admission of Arkansas to the United States dated June 15, 1836 (*Ark. Stat. Ann.* Vol. 1, p. 297), states at § 3: "All the laws of the United States, which are not

locally inapplicable, shall have the same force and effect within the said state of Arkansas as elsewhere within the United States." Second, Ark. Const., Art. 1, §6 provides in part: "The liberty of the press shall ever remain inviolate. The free communication of thoughts and opinions is one of the invaluable rights of man; and all persons may freely write and publish their sentiments on all subjects, being responsible for the abuse of such right. . . ." Third, Ark. Const., Art. 2, §13 provides: "Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character; he ought to obtain justice freely, and without purchase, completely, and without denial, promptly and without delay, comformably to the laws."

As stated by Justice Rehnquist in *Sumner v. Mata*, 449 U.S. 539, 549 (1981): "State judges as well as Federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinion as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office."

In *Kish v. Wright*, 562 P.2d 625 (Utah 1977), the trial court had refused to exercise jurisdiction over an action brought under 42 U.S.C. §1983 based on the doctrine of *forum non conveniens* and dismissed the case with prejudice. The Supreme Court of Utah first recognized that civil rights actions arising under §1983 could be brought within the state court jurisdiction. The court reversed and remanded the case back to the trial court because the possible effect of the trial court's dismissal with prejudice was to bar the plaintiff from seeking relief in the federal

courts by reason of *res judicata*. The court was obviously concerned that a plaintiff should have a forum within which to assert its claim.

Such a concern could hardly be more relevant than to the instant case. The appellant is precluded from bringing this action in federal district court because of the application of 28 U.S.C. §1341. Section 1341 states "the [United States] district courts shall not enjoin, suspend or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." Appellant's only remaining forum is state court, which should assume jurisdiction over the 42 U.S.C. §1983 action.

Furthermore, it is proper for the state court to use all of the powers available to a federal court in enforcing the action. This includes the power of a district court to award attorneys' fees to the prevailing party pursuant to 42 U.S.C. §1988. Section 1988 provides that a court, "in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs" in actions to enforce §1983.

The United States Supreme Court in *Maine v. Thiboutot*, 448 U.S. 1 (1980), recognized that §1988 applies to state courts and that a state court may award attorneys' fees to the prevailing party. In *Ramirez v. County of Hudson*, 169 N. J. Super. 455, 404 A.2d 1271 (1979), the defendant's regulation prohibiting employees from disclosing information to newspapers was held to be unconstitutional under the First and Fourteenth Amendments to the Constitution, and attorneys' fees were awarded.

By analogy, *Ramirez* is extremely relevant to the present action. As in *Ramirez,* appellant here is alleging deprivation of freedom of speech under the First and Fourteenth Amendments to the Constitution. As in *Ramirez,* appellant here is maintaining a § 1983 action based on a state action that is in violation of appellant's civil rights. As in *Ramirez,* appellee's actions here are a violation of the First and Fourteenth Amendments to the United States Constitution. Accordingly, appellant should be entitled to attorneys' fees pursuant to § 1988.

In addition, the discretion of a court in awarding attorneys' fees to a prevailing party is narrowly limited. The controlling standard for the awarding of attorneys' fees to the prevailing party under the provision of the Civil Rights Act of 1964 is set forth in *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400 (1968). There the Court stated that a prevailing party "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id* at 402. It would be unjust if the appellant were not awarded attorneys' fees, because the State of Arkansas has deprived the appellant of its civil rights and the appellant should not be monetarily penalized for the measures it has taken to correct such deprivation of rights. In summary, the state court should exercise jurisdiction over claims brought under 42 U.S.C. § 1983 and award attorneys' fees to the appellant under 42 U.S.C. § 1988, as well as other damages to which it may be entitled.

CONCLUSION

Accordingly, the appellant respectfully requests that the Court reverse the judgment of the Arkansas Supreme Court and remand this case to the Arkansas Supreme Court for a ruling on appellant's 42 U.S.C. § 1983 claim and for an award of a tax refund.

Respectfully submitted,

ANNE OWINGS WILSON
Counsel of Record

HOUSE, WALLACE, NELSON
& JEWELL P.A.
1500 Tower Building
Little Rock, Arkansas 72201
(501) 375-9151

(B)

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ARKANSAS WRITERS' PROJECT, INC. .....*Appellant*

VS.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS .....*Appellee*

ON APPEAL FROM THE
SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLEE

JOHN STEVEN CLARK
Attorney General of Arkansas
R. B. FRIEDLANDER
Special Counsel to the Attorney General
OFFICE OF ATTORNEY GENERAL
HERITAGE WEST BUILDING, SUITE 120
LITTLE ROCK, ARKANSAS 72201
(501) 371-2007
Attorneys for Appellee

JOSEPH V. SVOBODA
Revenue Legal Counsel
P.O. BOX 1272-L
LITTLE ROCK, ARKANSAS 72203
(501) 371-2451

ARKANSAS LEGISLATIVE DIGEST, INC.

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QUESTIONS PRESENTED

I.

DOES ARTICLE III OF THE UNITED STATES CONSTITUTION PRECLUDE CONSIDERATION OF THIS APPEAL?

II.

DOES APPELLEE'S TAX STRUCTURE VIOLATE THE FIRST AMENDMENT?

III.

DID THE ARKANSAS SUPREME COURT CORRECTLY DECLINE TO AWARD APPELLANT ATTORNEYS' FEES UNDER 42 U.S.C. §1983?

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No. 85-1370

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ARKANSAS WRITERS' PROJECT, INC. ..... *Appellant*

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS ..... *Appellee*

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Appellee's statement differs from that of Appellant in the following manner:

No declaratory judgment action was filed by Appellant below and thus, cannot be a basis for appeal from the Arkansas Supreme Court decision.

While Appellant pays sales tax on the sales of *Arkansas Times*, all other magazines whether religious, professional, trade and sports *or* of general interest are taxed as well if they are not "printed and published within the State . . . [and] sold through regular subscriptions."

After administrative hearing and a lower Court ruling on this case, Appellee's taxing structure was upheld by the

Arkansas Supreme Court on October 14, 1985. On petition for rehearing, the Court considered the constitutional issues, but found no First Amendment violation and that it was unnecessary to reach a Fourteenth Amendment question since if the tax exemption failed, it would not have availed Appellant the relief it requested.

SUMMARY OF ARGUMENT

In this Court, Appellant contends the failure to extend the exemptions for newspapers [§84-1904 (f)] and religious, professional, trade and sports publications [§84-1904 (j)], violates its rights under the First Amendment to the U.S. Constitution. Despite Appellant's stipulation that its publication is not a newspaper or a religious, professional, trade or sports publication, it claims entitlement to those same exemptions.

In fact, Appellant has never alleged the two cited tax exemptions are unconstitutional per se because should the exemptions be declared unconstitutional, Appellant's publication is still subject to the sales tax and its claim for a refund of taxes could not be granted. Therefore, Appellant advances arguments before this Court which are precluded under the "case and controversy" provisions of Article III of the United States Constitution. Appellee's position regarding Appellant's lack of standing is set out at part I of his Brief.

At part II of his Brief, Appellee discusses why Arkansas' taxing structure does not violate the First Amendment. Additionally, the *Minneapolis Star* case is distinguished from the situation presented to the Court in this appeal.

Finally, at part III of his Brief, Appellee addresses why the Arkansas Supreme Court correctly declined to award Appellant attorneys' fees under 42 U.S.C. §1983.

ARGUMENT

I.

ARTICLE III OF THE UNITED STATES CONSTITUTION PRECLUDES CONSIDERATION OF THIS APPEAL.

Appellant, as well as a majority of the amici,[1] has recognized that the First Amendment of the U.S. Constitution does not prohibit a state from imposing generally applicable economic regulations, including taxes, on the commercial sales by the press. Newspaper publishers were found by this Court not "immune from any of the ordinary forms of taxation for the support of the government." *Grosjean* v. *American Press Company*, 297 U.S. 233 (1936). Arkansas, as do 44 other states, imposes a sales tax on, with respect to, or measured by, sales of tangible personal property.[2] This tax was levied to raise revenue for clearly important concerns within the purview of state government interest.[3] This Court has recognized that a state has jurisdiction to levy a sales tax on sales of tangible personal property occurring within its boundaries. *Polar Ice Cream* v. *Andrews*, 375 U.S. 361 (1964).

The thrust of Appellant's argument is not that Arkansas cannot constitutionally impose a sales tax on the sale of all publications, including Appellant's *Arkansas Times' Magazine*, or that Arkansas cannot create classifications of publications for tax purposes so long as these classifications

[1]The only exception is the amici curiae brief of The Miami Herald Publishing Company.

[2]Section 3 of Act 386 of 1941 Acts of Arkansas (Ark. Stat. Ann. §84-1903) states "there is hereby levied an excise tax of 2 percentum (now 4 percent) upon the gross proceeds or gross receipts derived from all sales to any person . . .".

[3]Section 17 of Act 386 of 1941 Acts of Arkansas, setting forth the purposes of the Act which is discussed under Argument II of this brief.

"have some rational basis." [Appellant's Brief, p. 11, citing *Minneapolis Star and Tribune Company* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).] Appellant's argument is that Arkansas can tax all sales of publications, and can even exempt some classifications of publications, but the decision to not extend the exempt classes to include Appellant's magazine is unconstitutional.

Appellant has stipulated that its *Arkansas Times'* publication is neither a newspaper nor a religious, professional, trade or sports publication as enumerated in Ark. Stat. Ann. §84-1904 (f) and (j). (Joint App. p. 21). Despite this stipulation and the fact that Appellant has *never* alleged the two tax exemptions are unconstitutional per se (for obvious reasons),[4] Appellant advances arguments which are precluded under this Court's construction and application of Article III of the United States Constitution.

Article III limits the judicial power of the United States to resolutions of "cases" and "controversies" and therefore does not grant authority to determine the constitutionality of every legislative or executive act, whether Federal or State. Inherent in any consideration of the parameters of Article III is this Court's requirement that the litigant challenging the State action have "standing".

Article III requires, as a minimum, the litigant to show (1) that he personally has suffered some actual injury as the result of the conduct of the Defendant, (2) the injury can be traced to the challenged action and (3) that he *is likely to be redressed by a favorable decision*. (Emp. added) *Valley Forge College* v. *Americas United*, 454 U.S. 464, 472 (1982). If this

[4]Should the exemptions be declared unconstitutional, Appellant's publication is still subject to the sales tax and its claim for a refund of taxes could not be granted (Appellee's Motion to Dismiss, p. 5).

Court finds the exemptions at issue are unconstitutional (despite Appellant's failure to request such a finding), then Appellant fails to satisfy the third consideration under the foregoing standing requirements because Appellant's request for a refund of taxes cannot be granted. Both the strict Article III requirements and prudential principles enunciated thereunder warrant forebearance by this Court from considering Appellant's appeal. Appellant will not personally benefit in any tangible way by a decision of this Court, unless the ruling is a pronouncement that no state may tax sales of a commercial commodity that has any ties with First Amendment rights. Such a ruling would be clearly contrary to previous decisions of this Court and inappropriate under the unique facts (discussed hereafter) involved in this appeal.

In *Allen* v. *Wright*, 468 U.S. 737 (1984), this Court discussed at length the aspect of "standing" under Article III. In that case, parents of black children alleged that the Internal Revenue Service failed to fulfill its obligations by not denying tax exempt status to racially discriminatory schools and this conduct violated plaintiff's rights under the Fifth and Fourteenth Amendments. Citing *Valley Forge College, supra*, this Court reaffirmed the rule that a plaintiff must allege personal injury likely to be redressed by the requested relief. After acknowledging the constitutional components of standing which, like all prudential doctrines are not susceptible to precise definition, the Court went on to state:

> Typically, however, the standing inquiry requires careful judicial examination of a complaint's allegations to ascertain whether the particular plaintiff is entitled to an adjudication of the particular claims asserted. (468 U.S. at 752).

As previously stated, Appellant, having stipulated its *Arkansas Times' Magazine* is not within the classes of publi-

cations exempted, argues the exemptions must be statutorily construed to include its magazine to avoid violating the First Amendment. This Court is being requested to consider a question of constitutional law, having very far-reaching and direct effect on the taxing power of 45 states which have a retail sales or gross receipts tax by a party who, in effect, will not benefit in the form of its requested relief, a result prohibited by *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1917).

This Court has held that "those who do not possess Article III standing may not litigate as suitors in the courts of the United States. Article III, which is every bit as important in its circumscription of the judicial power of the United States as in its granting that power, is not merely a troublesome hurdle to be overcome if possible so as to reach the "merits" of a lawsuit which a party desires to have adjudicated; it is a part of the basic charter promulgated by the Framers of the Constitution . . .". *Valley Forge College, supra*, at 476.

Appellee is not advancing an Article III argument to "slam the courthouse door against plaintiffs who are entitled to full consideration of their claims on the merits" which troubled Justice Brennan in his dissenting opinions in *Valley Forge College* and *Allen, supra*. The Arkansas Supreme Court acknowledged in substance, but not name, the threshold problem of standing when it addressed Appellant's questioning of the constitutionality of the exemptions under the Fourteenth Amendment:

> It is first said that to exempt certain publications from the sales tax but to tax the sale of (Appellant's magazine) is a denial of equal protection. We need not explore this point for it would avail the (Appellant) nothing if it wins its argument. The legislature has levied a valid sales tax that is applicable to (Appellant). It is immaterial that an

> exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that must fall, not the tax against (Appellant).[5]

Appellant, like any plaintiff, must satisfy Article III and requirements developed thereunder. Appellant "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties". *Warth* v. *Seldin*, 422 U.S. 499 (1975).

A further factor to be considered is whether other prudential principles dictate consideration of this *specific* appeal. A review of the entire record, especially in light of Appellant's assertion that Appellee has failed to justify a differential treatment of publications, mandates the Court not consider this appeal.

Appellant, and some of its amici,[6] severely chastises Appellee for failing to submit any rational basis or compelling governmental interest supporting its tax structure that "overrides Appellant's fundamental right of freedom of speech and press and the protection of discrimination in the exercise of those rights". Appellant then lists the similarities between newspapers and its magazine and concludes that Appellee has failed to provide any rational basis for distinguishing these types of publications for purposes of the exemption in Ark. Stat. Ann. §84-1904 (f). Appellant next discusses the so-called magazine exemption [Ark. Stat. Ann. §84-1904 (j)] by listing what was alleged to be the Appellee's three justifications for differential tax treatment, concluding there is absolutely no evidence in the record to support those justifications.

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[5]Jurisdictional Statement, p. 11, November 18, 1985, Supplementary Opinion on Rehearing of Arkansas Supreme Court.

[6]Appellant's brief, p. 12-14; amicus brief of American Civil Liberties Union Foundation, p. 17 and p. 25-26; amicus brief of Times Mirror Company, p. 3.

What Appellant does not acknowledge, and what is perhaps overlooked by the various amici, is the posture of the case at the time the "justifications" were advanced by Appellee.[7] Quite simply, Appellee did not advance these justifications at any time in opposition to Appellant's claim that the exemptions were unconstitutional. **APPELLANT NEVER CLAIMED THE EXEMPTIONS WERE UNCONSTITUTIONAL, ONLY THAT APPELLEE'S INTERPRETATION WHICH DID NOT EXEMPT APPELLANT'S MAGAZINE WOULD LEAD TO AN UNCONSTITUTIONAL RESULT.** Even a cursory review of the record will demonstrate the proper context of Appellant's remarks. Appellant's argument was predicated on statutory construction and was presented in the form of a Motion for Summary Judgment[8] which by its very nature precludes testimony. Furthermore, at the hearing on that motion, Appellant stipulated that it was neither a newspaper nor one of the four enumerated publications covered by the tax exemp-

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[7]"Like the *Times*, magazines or journals printed and published by religious, professional, trade and sports groups or organizations are 'publications' but they do differ in many respects. A magazine or journal devoted exclusively to religion or to a profession, such as an accounting or medical journal, is of interest to a much smaller segment of the population than is the *Times*. Because of this fact, such publication could hardly be sold in vending boxes or at a retail location such as newsstands, grocery or drug stores and unlike the *Times* or similar magazines, would depend almost exclusively upon subscription readers for its sales. A publication of one of these four types would have little interest in or opportunity to expand its circulation outside of its area of interest. In addition, the publishers in most cases would be publishing the magazine as a service to its readership rather than as a revenue producer. The Arkansas Legislature could have had these facts and others in mind when it granted the sales tax exemption to these four types of publication." *Commissioner's Reply Brief to Arkansas Writers' Brief in Motion for Summary Judgment*, p. 42-43 of the transcript.

[8]*Arkansas Writers'* Motion for Summary Judgment before the Pulaski County Chancery Court, p. 8 of the transcript.

tions in question. When this is considered, it is easy to see why the record made in the trial court and considered by the Arkansas Supreme Court is completely devoid of any factual evidence tending to refute a First or Fourteenth Amendment challenge under this Court's guidelines. Summary judgment can only be granted when there is no genuine issue of a material fact. Appellee, in its Motion to Deny Summary Judgment, simply set forth the foregoing three "justifications" to show there were factual issues in dispute which should be considered *in response to Appellant's interpretation of the statutory exemptions.*

Despite all of the foregoing, Appellant now fashions its argument so as to require this Court to make a pronouncement of constitutional law that will directly touch the taxing system of a majority of the states, in varying degrees, without the Court having the benefit of any development of a record tending to support the issue now advanced. Appellant and its amici are urging a resolution of a legal question, not in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action, but rather in a rarified atmosphere of a debating society which was found repugnant by this Court in *Valley Forge College, supra*, at 472.

Based on fundamental principles set forth by this Court, further judicial consideration of Appellant's appeal is precluded.

II.

APPELLEE'S TAXING STRUCTURE DOES NOT VIOLATE THE FIRST AMENDMENT.

Appellant repeatedly refers to *Minneapolis Star and Tribune Company* v. *Minnesota Commissioner of Revenue*, 460 U.S. 570 (1983) as the authority which best highlights the constitutional infirmities of Arkansas' general tax laws with limited exemptions.

This Court succinctly stated the issues presented therein at page 576:

> This case presents the question of a State's power to impose a special tax on the press and, by enacting exemptions, to limit its effect to only a few newspapers.

As the facts of *Minneapolis Star* were persuasive to the Court in its determination a First Amendment violation had occurred, Appellee has compared facts under consideration in this appeal with those presented by the State of Minnesota. The result is clear — Arkansas' tax does not bear the same constitutional infirmities found in *Minneapolis Star:*

MINNESOTA TAX	*ARKANSAS TAX*
(A) Tax was *a special use* tax imposed on the cost of *only* paper and ink products consumed *only* in the production of a publication.	(A) Tax is *a general sales* tax imposed on proceeds of sales of all tangible personal property less specific exemptions.
(B) Tax was unique and completely contrary to the State's general scheme of taxation since was levied on	(B) Tax consistent with the State's overall general scheme of taxation since it is not on the publisher but

MINNESOTA TAX	*ARKANSAS TAX*
the publisher consuming paper and ink and not the purchaser of the publication.	rather on the purchaser of the publication with the publisher being only the tax collecting mechanism.
(C) Tax was "use" tax even though it did not serve the function of protecting Minnesota's sales tax.	(C) Tax and exemptions deal with same type of tax and serve identical state revenue functions.
(D) Amendment creating exemption was enacted to specifically affect identifiable taxpayers already known to exist by the legislature.	(D) Both exemptions were passed before Appellant's magazine ever came into existence; thus, were not passed with any actual intent to affect known taxpayers.
(E) The exemption singled out by size only a few members of a specific class, i.e., publishers.	(E) The exemptions enumerated are sub-classifications, not dependent on size only, within a general classification.

In *Minneapolis Star*, this Court, after first setting forth the rule that it is beyond dispute that state governments can subject newspapers to generally applicable economic regulations without creating constitutional problems, stated:

> Minnesota, however, has not chosen to apply its general sales and use tax to newspapers. Instead, it has created a special tax that applies only to certain publications . . . and, singles out publications for treatment that is, to our knowledge, unique in Minnesota tax law.

Minnesota's treatment of publications differs from that of other enterprises in at least two important respects:[1] It imposes a use tax that does not serve the function of protecting the sales tax and it taxes an intermediate transaction rather than the ultimate retail sale. (460 U.S. at 581).

Further, the ordinary rule in Minnesota . . . is to tax only the ultimate, or retail, sale rather than the use of components like paper and ink . . . publishers, however, are taxed on their purchases of components, even though they will eventually sell their publications at retail. (460 U.S. at 582).

Arkansas, to the contrary of Minnesota's taxing scheme, has enacted what this Court has held permissible. It passed a general sales tax law in 1941 [Act 386 of 1941 (Ark. Stat. Ann. §84-1901, et seq.)] levying an excise tax of 2 percent (now 4 percent) on the gross proceeds or receipts derived from the sale of "all tangible personal property" (Ark. Stat. Ann. §84-1903). Arkansas' sales tax law (Section 17) stated that the *purpose* of the sales tax was to provide revenue for establishing and maintaining (a) schools (including free textbooks), (b) school library service, (c) state charitable institutions and (d) to support wards of the state. Within that general sales tax law a number of exemptions were passed by the legislature to recognize the special needs of the state and varied greatly to accomplish desired goals. Exemptions are granted based on:

the method of sale,[2] or,

[1]The Court also noted a third difference. The use tax is not visible to the consumers while the sales tax must, by law, be stated separately as an addition to the price (460 U.S. 581).

[2]Section 84-1904(i) exempts sales between retailers as "sale for resale" so that the tax will be charged and collected only one time, on the sale to the ultimate purchaser.

by virtue of the party making the sale,[3] or,

the person to whom the sale is made,[4] or

even the type of tangible personal property being sold.[5]

Clearly, numerous items are exempted from Arkansas' general sales tax. Consistent with Arkansas' entire taxation scheme and the legislature's purpose of providing maximum state revenue while recognizing legitimate reasons for exemptions, Act 386 of 1941 specified that the sales of newspapers would be exempt. In 1948, Arkansas passed Act 152 which extended the exemption to religious, professional, trade and sports publications. [Ark. Stat. Ann. §1904 (j)].

The *Arkansas Times*, contrary to Appellant's assertions at Pages 26-27 of its Brief, is not the only general interest magazine in the State of Arkansas which is not entitled to a tax exemption. In actuality, the vast majority of magazines sold in this State, whether religious, sports, professional, trade *or* general interest are subject to the Arkansas sales tax, because they do not satisfy all requirements of the exemption; namely, (1) "printed and published within the state"; (2) "sold through regular subscriptions"; and (3) "within the sub-classifications given". In order for any magazine to be exempt from Arkansas' sales tax, it must meet *all three* conditions as a prerequisite to claiming the exemption.

All of the factual differences between *Minneapolis Star* and that of Arkansas' general sales tax (set out above) lead to

[3]Section 84-1904(c) exempts sales by churches and §84-1904(d) exempts sales by charitable organizations.

[4]Section 84-1904(g) exempts sales to the United States Government.

[5]Section 84-1904(r)(2) exempts sales of machinery used directly in manufacturing.

this conclusion — Arkansas has not engaged in conduct violative of the First Amendment. It has not "targeted" or "singled" out the press, a practice found so constitutionally repulsive by this Court in *Grosjean* v. *American Press Co., supra,* and *Minneapolis Star, supra.* Its Legislature has not affirmatively acted to penalize publications of a certain size in existence at time of enactment. Its general sales tax fulfills a valid governmental function — the raising of state revenues.

Arkansas' taxing structure does not impair the First Amendment rights of Appellant nor substantially hinder the *Times* in its operation. In fact, all that is required of Appellant is to collect, not bear, the sales tax as do other Arkansas businesses.

The correct analysis to be applied is a "rational basis" test under Fourteenth Amendment guidelines. Appellant has not raised the Fourteenth Amendment issue in this context; however, this is a more applicable standard since Appellant has failed to demonstrate a First Amendment infringement.

This Court has always shown the greatest deference to state legislatures in devising their tax schemes and on numerous occasions acknowledged the rule that while all governmentally created classifications must have some rational basis, the fact that they have been enacted by a presumably rational legislature arms them with a presumption of rationality. The exemptions at issue here have endured for forty-five (45) and thirty-eight (38) years respectively.

States may impose different specific taxes upon different trades and professions and may vary the rate of excise upon different products. States are not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value. *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U.S. 522 (1959).

Justice Rehnquist in his dissent in *Minneapolis Star* isolated the one aspect which most distinguishes the facts considered in this appeal from those involved in *Minneapolis Star,* which is that the State can only be required to justify its action in devising classifications if there has been an "infringement by the state's classification which significantly burdens specially protected rights." (460 U.S. at 600). The decision that Appellant's publication does not fall within one of the exemptions has not been shown to be an infringement upon Appellant's First Amendment rights, other than in a philosophical context, and therefore demonstrated no abridgment of a fundamental right.

Appellee has authority to impose its sales tax structure consistently with First Amendment rights. The mere fact that not all publishers are subject to the same economic regulation does not render a regulation, otherwise general in application, invalid under the First Amendment. *Regan* v. *Taxation With Representation of Washington,* 461 U.S. 540 (1983); *Mabee* v. *White Plains Publishing Company,* 327 U.S. 178 (1946). As recently as last year, this Court affirmed at least two other state court opinions involving exemptions from a tax where the exemption favored one media organization over the other. See *Matter of the Assessment of Additional North Carolina and Orange County Use Taxes* v. *Village Publishing Company,* 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed, ___ U.S. ___, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985) and *Chicago Tribune Company v. Johnson,* 106 Ill. 2d 63, 477 N.E. 2d 482, appeal dismissed, ___ U.S. ___, 106 S. Ct. 241, 88 L. Ed. 2d 250 (1985). Even though in both of these cases the appeal was dismissed for lack of a substantial federal question, nevertheless they recognize adherence to the longstanding rule that, particularly in the area of taxation, a state has the greatest latitude in arriving at classifications.

Arkansas' exemptions at issue were enacted for a reason. Unfortunately, no cognizable legislative history exists explain-

ing the actions of the legislature which enacted them. However, such specific publications of limited audience, primarily sold through subscription only, could have utilized the benefits of tax exemption as other fledgling businesses.

For instance, the Arkansas Legislature has exempted from sales taxation coin-operated car washes, Ark. Stat. Ann. §84-1903(c)(3). Not only do such exemptions further a legitimate State goal of promoting initiation and growth of small businesses, but they also illustrate the State's recognition that revenues produced should exceed cost of administering the tax. The foregoing demonstrates that the exemptions at issue were not enacted by the Arkansas Legislature based on the content of publications, but rather, for other justifiable State concerns.

To attempt exemption of a publication containing largely political or social commentary (as does the *Times*) could easily have the undesirable effect of promoting punitive action by a state legislature if the publication to receive the exemption did not comply with legislative wishes. To treat such publications as these differently from the vast number of other like services and items would produce the very results so unconscionable to this Court, i.e., the threat of retaliatory governmental action based on content of a publication.

Under clear and reasoned precedent of this Court, Appellant has not demonstrated Appellee's tax structure violates the First Amendment.

III.

THE STATE COURT CORRECTLY DECLINED TO AWARD APPELLANT ATTORNEYS' FEES UNDER 42 U.S.C. §1983.

The trial court, ruling strictly on statutory construction, did not address Appellant's request for attorneys' fees (Jurisdictional Statement, p. 17) and the Arkansas Supreme Court did not reach Appellant's cross-appeal of this issue because Appellant was not the prevailing party. (Jurisdictional Statement, p. 12)

Appellee admits that state courts have concurrent jurisdiction with federal courts and may entertain actions brought under 42 U.S.C. §1988 and, if appropriate under the circumstances, award an attorney's fee under 42 U.S.C. §1983. However, the mere existence of concurrent jurisdiction does not automatically require a state court to consider and grant such relief, especially where this relief is claimed during the pursuit of a state tax refund, a procedure through which an adequate remedy is provided by the state. Existence of jurisdiction does not mean that it must be exercised nor that grounds may not be shown to persuade the court to refrain from exercising its admitted jurisdiction. *Kansas City Southern R. Co.* v. *United States*, 282 U.S. 706 (1951).

The South Carolina Supreme Court issued a recent decision in a case where a taxpayer was sustained in an action brought against the South Carolina taxing authority by virtue of a state statutory refund remedy but was refused the attorneys' fees requested pursuant to 42 U.S.C. §1983. In *Spencer* v. *South Carolina Tax Commission*, 316 S.E.2d 386 (1984), aff'd, 471 U.S. ___ (1985), Plaintiffs were residents of North Carolina who earned income in South Carolina and filed a South Carolina return claiming non-business itemized deductions.

After audit, these deductions were disallowed resulting in South Carolina tax liability. The disallowance was found by the South Carolina Supreme Court to be based upon an unconstitutional statute which violated the Privileges and Immunities Clause of the U.S. Constitution. The Court further found the state remedy complete and adequate for the taxpayer's action and therefore declined to address the claim for attorneys' fees under §1983 and §1988. The Plaintiffs argued that the Supremacy Clause may constitutionally give Congress the authority to require a state court to hear a federal cause of action and that Congress had exercised such power to its fullest extent. The South Carolina Supreme Court found such an argument ignored the clear intent expressed by Congress to limit its power by the enactment of 28 U.S.C. §1341. That section illustrates congressional intent to allow a state to handle its own fiscal affairs unimpeded by federal causes of action so long as there is a plain, speedy and efficient remedy in the state court. Since Congress has chosen to demand that state tax suits be pursued in state court pursuant to that state's remedy, it cannot logically be argued that Congress has demanded that §1983 and §1988 suits be heard in state court for tax refund suits.

To conclude that §1988 actions are required to be heard in state tax refund suits would be in direct conflict with the holding in *Fair Assessment in Real Estate Association* v. *McNary*, 454 U.S. 100 (1981), and violates the fundamental principles of comity requiring Federal courts to defer to states on matters relating to state taxation and remedies thereunder.

The courts of two other states have considered a state tax action in state court involving a §1983 claim, and both have found the state remedy adequate and have exercised their discretion in not allowing the §1983 claim. *Bacus* v. *Chilivis*, 236 Ga. 500, 224 S.E.2d 377 (1976) and *State Tax Commission* v. *Fondren*, 387 So.2d 712 (Miss. 1980), cert. den., 450 U.S. 1040 (1981).

The similarity between the facts in this appeal and those cited above, especially *Spencer*, is remarkable. Appellee's original Complaint specified that the tax appeal was brought in the Pulaski County Chancery Court pursuant to the Arkansas Tax Procedure Act, (Ark. Stat. Ann. §84-4741) and the relief under §1988 was requested merely to authorize recovery of Appellant's attorneys' fees. The Arkansas Tax Procedure Act does not allow for attorneys' fees because the Arkansas Legislature did not intend same when it established an appeals remedy procedure for cases involving state taxes.

A number of courts in other jurisdictions have declined to award attorneys' fees in cases where the §1988 claim serves no purpose other than as a conduit for award of attorneys' fees. *Anderson* v. *Thompson*, 658 F.2d 1205 (7th Cir. 1981); *Roberts* v. *Mills*, 291 Or. 21, 628 P. 2d 714 (1981).

Further justification for invoking the discretionary denial of attorneys' fees in this action is derived from the substantive nature of the Appellee's claim. Even if tax refund claims fall within the scope of §1983, it is not the type of civil rights action that §1988 was primarily intended to encourage. The legislative history of §1988 clearly indicates that Congress did not intend to shift liability for attorneys' fees in all cases against state defendants, but rather only to encourage private enforcement of the most "basic" and "fundamental" civil rights. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 9 (1976). Courts have properly given effect to the limited congressional intent that is the underlying basis of §1988 — to protect civil rights — by exercising discretion to deny fees more readily in non-civil rights cases or cases where the interests at issue are more private than public in nature. *Boland* v. *City of Rapid City*, 315 N.W.2d 496 (S.D. 1982).

Thus, in this appeal, which cannot be characterized as a

traditional civil rights action, it is particularly appropriate to exercise discretion and to deny Appellant's claim for attorneys' fees.

CONCLUSION

The issues presented by Appellant in this case were not fully developed below because of Appellant's failure to raise constitutionality *per se* of Arkansas' exemptions to its general sales tax. This alone should preclude consideration of Appellant's claims by this Court.

If such claims are to be appraised by this Court, Appellee's taxing structure should stand as not violative of the First Amendment. The Arkansas Supreme Court correctly perceived and disposed of the issues in this case.

Appellee respectfully requests that the decision of the Arkansas Supreme Court be affirmed.

Respectfully submitted,

JOHN STEVEN CLARK
Attorney General of Arkansas
R. B. FRIEDLANDER
Special Counsel to the Attorney General
OFFICE OF ATTORNEY GENERAL
HERITAGE WEST BUILDING, SUITE 120
LITTLE ROCK, ARKANSAS 72201
(501) 371-2007
Attorneys for Appellee

JOSEPH V. SVOBODA
Revenue Legal Counsel
P.O. BOX 1272-L
LITTLE ROCK, ARKANSAS 72203
(501) 371-2451

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he has served three copies of the foregoing Brief for Appellee, by placing same in the U.S. Mail, First Class, postage prepaid, this 2nd day of October, 1986, on Anne Owings Wilson, Attorney for Appellant, at HOUSE, WALLACE, NELSON & JEWELL, P.A., 1500 Tower Building, Little Rock, Arkansas 72201, Rex S. Heinke, GIBSON, DUNN & CRUTCHER, 333 South Grand Ave., Los Angeles, California 90071, Philip Kaplan, KAPLAN, BREWER & MILLER, P.A., 415 Main Street, Little Rock, Arkansas 72201, Donald M. Middlebrooks, STEEL, HECTOR & DAVIS, 4000 Southeast Financial Centre, Miami, Florida 33131, David Minton, 1319 Eighteenth Street, N.W., Washington, D.C. 20036, E. Barrett Prettyman, Jr., HOGAN & HARTSON, 815 Connecticut Avenue, N.W., Washington, D.C. 20006 and Edward Soto, Southeast Financial Centre, Suite 4350, Miami, Florida 33131.

/s/ JOHN STEVEN CLARK
Attorney for Appellee

Supreme Court, U.S.
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No. 85-1370

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

v.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR APPELLANT

Anne Owings Wilson
House, Wallace & Jewell, P.A.
3800 Capitol Tower Building
Little Rock, AR 72201
(501) 375-9151

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DESIGNATION OF CORPORATE RELATIONSHIPS

Arkansas Writers' Project, Inc., filing this Reply Brief of Appellant in this proceeding, states that:

This is its third Designation of Corporate Relationships. The Desig-

nations that were previously filed are currently accurate.

Dated: January 9, 1986

BEST AVAILABLE COPY

No. 85-1370

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October Term, 1986

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v.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS.....Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

REPLY BRIEF FOR APPELLANT

The Appellee's Brief contains several incorrect or misleading statements regarding both the facts and the law. In addition, the arguments advanced by Appellee that Appellant lacks standing, that the "rational basis" test should apply, and that the State's classifications are rational are unsupported by

any cases or persuasive legal analysis.

The inaccuracies are as follows:

On page 1, it states that no declaratory judgment action was filed by Appellant. The prayer of Appellant's Complaint (Joint Appendix p. 5) does seek a declaratory judgment.

Also on page 1, it states that "all other magazines" pay sales tax, thereby implying that there are a vast number of magazines, all paying sales tax. A similar misleading comment is on page 13, where Appellee says that "the vast majority of magazines sold in this State...are subject to the Arkansas sales tax..." Alan Leveritt, the publisher of Arkansas Times, stated in his affidavit (Joint Appendix, pp. 12-13) that Arkansas Times was, to his knowledge, the only magazine which was taxed on its subscription sales. The affidavit of Gale Price of the Revenue Department (Joint

Appendix, pp. 19-20) stated that Arkansas Times was not the only magazine so taxed, but failed to name any other publications or even to state how many, if any, were taxed on subscription sales. It is conceded that consumers are charged sales tax on over-the-counter sales of magazines.

On page 3, Appellee implies that Appellant recognizes that a tax imposed on sales of publications is not unconstitutional. Appellee does not state where Appellant "recognizes" this principle. Appellant does not recognize that a tax on sales of publications is constitutional. However, a ruling on this issue is not necessary to the determination of this case.

Also on page 3, Appellee claims that Appellant believes that the State can create classifications of publications which have a rational basis. This is

simply not true, as Appellant has strongly argued that a state must have a compelling reason for selecting particular publications for taxation where other publications are exempt.

Aside from these inaccuracies, Appellee's arguments are unsupported. Appellee claims on page 4 that there is no "case or controversy," on the assumption that the only remedy is a finding that the exemptions themselves are unconstitutional. Regardless of whether the remedy is a revocation of the exemptions or their extension to Appellant, Appellant has standing. The reason is expressed in Heckler v. Matthews, 465 U.S. 728 (1984). Matthews involved social security benefits payable to spouses. Until this Court ruled in Califano v. Goldfarb, 430 U.S. 199 (1977), that a gender-based classification violated the right to equal pro-

tection guaranteed by the Fifth Amendment, wives and widows were entitled to receive spousal benefits regardless of whether they were dependent on their husband, while husbands and widowers had to prove dependency in order to receive spousal benefits. After Goldfarb, Congress enacted legislation requiring government pensions to be offset against spousal benefits, except that government pensions of wives and widows, and dependent husbands and widowers, who qualified for benefits prior to December 1982 were not offset against social security spousal benefits. A severability clause provided that if the discrimination were ruled invalid, the exemption would be invalid. Therefore, at issue was whether the severability clause, if valid, would deprive the appellee of standing by eliminating any possibility that he would receive social security benefits.

This Court pointed out that there are two remedial alternatives to be under-inclusive scheme: to nullify the statute and order that the benefits not extend to the class that the legislature intended to benefit, or to extend the coverage to include those aggrieved by the exclusion. 465 U.S. at 738. Whether a court imposes the remedy of extension or of nullification would depend on the nature of the statute, the commitment of the legislature to nullification as opposed to extension, and the degree of potential disruption that would occur by extension rather than abrogation. 465 U.S. at 738, n.5. Since the wrong complained of is the unequal treatment, either alternative would remedy the situation.

The exemptions in issue are under-inclusive and discriminate against Appellant. Although either nullification

of the exemptions or their extension to Appellant would remedy the unequal treatment, the probable remedy is to extend the exemption to include Appellant, as this Court has done in similar cases involving bans on picketing where particular categories of speech were exempted from the ban. Police Department of Chicago v. Mosely, 408 U.S. 92 (1972); Carey v. Brown, 447 U.S. 455 (1980). Rather than declaring the exemptions to be unconstitutional, this Court held the bans to be unconstitutional because unequally applied. Similarly here, it is the unequal application of the tax and not the exemption which should be declared unconstitutional.

In Armco v. Hardesty, 467 U.S. 638 (1984) an out-of-state manufacturer successfully challenged, on Commerce Clause grounds, a state use tax because the state exempted in-state manufacturers

from sales tax. The remedy was not to strike the exemption, but to include out-of-state manufacturers in the exemption by holding that the discriminatory scheme was invalid.

Since the taxing scheme is unconstitutionally underinclusive, and the unequal imposition of a tax on Arkansas Times is therefore unconstitutional, there is a "case or controversy" before the Court and Appellant has standing regardless of which of the two remedies is ultimately found to be most appropriate.

On pages 8-9, Appellee states that its failure to present evidence in support of its justifications for the taxing scheme was due to the fact that the case was decided on a motion for summary judgment. Aside from the fact that factual material, in the form of affidavits and depositions, can be (and

was) presented in response to our motion for summary judgment (see Affidavit of Gail Price, Joint Appendix, pp. 19-20), the State also conceded in connection with the summary judgment motion that no factual disputes remained. In the parties' Joint Stipulation (Joint Appendix, pp. 21-22), the parties submitted the case to the court upon the pleadings, briefs, and stipulations. Appellee had ample opportunity to present factual material. It cannot now complain of the lack of evidence in support of its position.

Several more misstatements are made on page 15. Appellee states that this Court "affirmed" two lower court decisions, where in fact the appeal in each case was dismissed. Matter of the Assessment of Additional North Carolina and Orange County Use Taxes Against Village Publishing Corporation, 312 N.C.

211, 322 S.E. 2d 155 (1984), appeal dismissed, 105 S. Ct. 2693, (1985) and Chicago Tribune Company v. Johnson, 106 Ill. 2d 63, 477 N.E. 2d 482 (1984), appeal dismissed, 106 S. Ct. 241 (1985). Appellee also states that these cases involve exemptions from a tax favoring one media organization over another. Neither of these cases involve such an exemption.

The North Carolina case involved a use tax imposed where a publisher purchased copies of its paper from the printer. There was an exemption for sales of newspapers by street vendors and delivery boys which the appellant argued should be applied to its purchases from its printer. However, the discrimination was on the basis of the method of delivery and not the type of publication or its content. Thus, one media organization was not favored over the other, as

is suggested by Appellee on page 15 of its brief.

Similarly, in Chicago Tribune v. Johnson, sales of manufacturing equipment used to produce tangible personal property for sale were exempt from taxation, except that sales of printing equipment were not exempt. The statutes did not favor one media organization over another.

The Appellee cites few cases in support of its position, and several of the few are mis-cited. Appellee cites no case where this Court has upheld a tax imposed against one type of publication and not another; or where this Court has upheld any content-based discrimination. On the other hand, the Brief of Appellant and the briefs of amici curiae filed on behalf of Appellant demonstrate that the First Amendment, as interpreted in the various cases cited in such briefs, prohibits the type of discrimination at

issue in this case.

Appellant therefore renews its requests for the relief which it previously made.

Respectfully submitted,

Anne Owings Wilson
Counsel of Record
House, Wallace &
Jewell, P.A.
3800 Capitol Tower Building
Little Rock, AR 72201
(501) 375-9151

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she has served the foregoing Reply Brief, by placing three copies of same in the U.S. Mail, first class, postage prepaid, this 9th day of January, 1987, addressed to John Steven Clark, Attorney General of Arkansas, Heritage West Building, Suite 120, Little Rock, Arkansas, 72201.

ANNE OWINGS WILSON

MOTION FILED

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No. 85-1370

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

v.

RAGLAND, COMMISSIONER OF REVENUE,
Appellee.

On Appeal from the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF TIME INC. IN SUPPORT OF APPELLANT

E. BARRETT PRETTYMAN, JR.*
DAVID J. SAYLOR
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685
Counsel for Amicus Curiae
Time Inc.

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF TIME INC. IN SUPPORT OF APPELLANT

Time Inc. ("Time") respectfully moves for leave to file the attached brief *amicus curiae*. The consent of counsel for appellant to the filing of this brief has been obtained. The consent of counsel for appellee was requested but refused.

Time is the largest publisher of general circulation magazines in the United States. It publishes and distributes Time Magazine, Fortune, Sports Illustrated, People, Money, Life, and Discover. Time Magazine alone has a domestic circulation of 4.6 million. In addition, a subsidiary of Time, Southern Progress Corporation, publishes Southern Living and Southern Accents. Time frequently participates as *amicus curiae* before this Court in cases raising important issues under the First Amendment. *See, e.g., Anderson* v. *Liberty Lobby*, 54 U.S.L.W. 4755 (U.S. June 25, 1986); *City of Los Angeles* v. *Preferred Communications, Inc.*, 106 S. Ct. 2034 (1986).

Time's publications are sold in Arkansas as well as the rest of the United States and abroad. When sold by individual retailers in Arkansas, the magazines are subject to the gross receipts tax on sales at issue in this appeal. The question presented is whether an Arkansas statute exempting newspapers and certain magazines from the gross receipts tax on sales, while taxing other magazines, violates the First Amendment. Time has a direct interest in the resolution of that question. In addition, the disposition of the present appeal will affect practices in other States concerning special or selective taxation of periodicals, in a manner that would directly affect the operations of Time throughout the United States.

The statute at issue in this appeal distinguishes between publications for purposes of taxation on the basis of content, type of publication, and whether the publication is printed and published in Arkansas or outside the State. It is not clear that appellant, publisher of a magazine printed and published within the State, will raise all of the arguments contesting the validity of the statute, including those that are significant with respect to publications from outside the State. Time accordingly submits that its participation as *amicus* may help ensure that the Court is presented with a full exposition of the issues raised in this appeal, and the effect that resolution of the appeal will have not only on publishers in Arkansas but on those like Time, with operations throughout the United States.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
DAVID J. SAYLOR
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685
Counsel for Amicus Curiae
Time Inc.

* Counsel of Record

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BRIEF *AMICUS CURIAE* OF TIME INC. IN SUPPORT OF APPELLANT

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Time Inc. ("Time") is the largest publisher of general circulation magazines in the United States. It publishes and distributes Time Magazine, Fortune, Sports Illustrated, People, Money, Life, and Discover. Time Magazine alone has a domestic circulation of 4.6 million. In addition, a subsidiary of Time, Southern Progress Corporation, publishes Southern Living and Southern Accents.

By its terms, the Arkansas gross receipts tax at issue in this appeal covers sales of these publications by individual retailers in Arkansas. Appellant challenges the constitutionality of the Arkansas tax on the ground that

the discriminatory application of the tax to some magazines, while newspapers and certain other magazines are exempt, violates the First Amendment. Resolution of this question will have a direct effect on nonsubscription sales of the magazines published by Time, since they are subject to the challenged tax. The Court's disposition of this appeal will also affect the practices in other States with respect to special or selective taxation of media, and directly affect the operations of *amicus* throughout the United States.

STATEMENT OF THE CASE

Arkansas exempts some members of the press but not others from its gross receipts tax on sales. In selecting which members of the media are entitled to an exemption from the tax, Arkansas law looks to the content of the publication, the nature of the publication, and whether it is printed and published within Arkansas or outside the State.

Ark. Stat. Ann. § 84-1903 imposes a three percent tax on gross receipts derived from sales. Section 84-1904 exempts from this tax a lengthy list of products, from unprocessed crude oil to gate admission fees to rodeos. Included among these exemptions is an exemption for "[g]ross receipts or gross proceeds derived from the sale of newspapers," *id.* § 84-1904(f), and an exemption for "religious, professional, trade and sports journals and/or publications printed and published within this State, * * * when sold through regular subscriptions." *Id.* § 84-1904(j).[1]

Appellant Arkansas Writers' Project, Inc., publishes *Arkansas Times Magazine*, a general interest monthly magazine. *Arkansas Times* is printed and published in Arkansas, and is sold through regular subscriptions.

[1] Subsection 84-1904(j) also provides an exemption for "[g]ross proceeds derived from sales of advertising space in newspapers and publications and billboard advertising services."

Since it is not a religious, professional, trade, or sports journal or publication, however, and since it is not considered a newspaper, *Arkansas Times* is compelled to pay the gross receipts tax.

After this Court's decision in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), *Arkansas Times* filed a claim before the Arkansas Commissioner of Revenue for a refund of the gross receipts taxes it had paid since October 1982. *Arkansas Times* claimed that if the "magazine exemption" were not construed to cover it, the selective taxation of *Arkansas Times*, while newspapers and other magazines were exempt, would violate the First and Fourteenth Amendments to the United States Constitution. App. to J.S. 12-13. The claim for a refund was denied, and *Arkansas Times*, having exhausted its administrative remedies, proceeded to state court. The Chancery Court of Pulaski County held that *Arkansas Times* was entitled to an exemption as a matter of statutory interpretation, *id.* 14-18, but the Arkansas Supreme Court reversed on appeal, holding that to qualify for an exemption a magazine not only must be printed and published in Arkansas and sold through subscriptions, but must also be "a religious, professional, trade, or sports periodical." *Id.* 10.

In a supplementary opinion on rehearing, the Arkansas Supreme Court considered the constitutionality of the selective tax exemption under the First and Fourteenth Amendments, an issue that had previously been argued by *Arkansas Times* and which the court recognized "should have been discussed" in its original opinion. *Id.* 11. The court rejected the claim of discriminatory treatment, reasoning that *Arkansas Times* could not object to exemptions granted to others:

> [I]t would avail [*Arkansas Times*] nothing if it wins its argument. * * * It is immaterial that an exemption in favor of some other taxpayer may be

> invalid, as discriminatory. If so, it is the exemption that would fall, not the tax against the *Times*. The courts cannot create a tax exemption; that must be done by the legislature. It has not exempted the *Times*. [*Id.*]

The court also rejected the argument that the selective tax on the *Arkansas Times* violated the First Amendment and this Court's decision in *Minneapolis Star*, *supra*. The Arkansas Supreme Court stated that this Court

> said that the owners of newspapers are not immune from any of the "ordinary forms of taxation" for support of the government. That statement applies with even greater force to the *Times*, a monthly magazine publishing matters of general interest. [App. to J.S. 12.]

Arkansas Times appealed to this Court, presenting the question whether a state tax imposed on *Arkansas Times* from which newspapers and certain other magazines were exempt violated the First Amendment. J.S. 1.

SUMMARY OF ARGUMENT

Arkansas law looks to the content of magazines to determine whether to tax them. Such content-based discrimination among otherwise indistinguishable publications is a clear burden on speech protected by the First Amendment, and can survive only if the State can demonstrate that the discrimination is necessary to achieve a compelling state interest. The State's interest in raising revenue is certainly important, but that interest in no way explains the selective exemption of some magazines from the tax on the basis of content. It is not the tax itself but the discriminatory application of the tax on the basis of the content of publications that offends the First Amendment.

Quite apart from this content-based discrimination, the Arkansas statute also violates the First Amendment be-

cause it imposes the tax on some segments of the media but not others. Just as Arkansas may not favor speech on some subjects as opposed to others in the application of its tax code, so too it may not favor some speakers over others. Newspapers and magazines are entitled to the same protection under the First Amendment, yet Arkansas arbitrarily favors speech by newspapers by granting them a tax exemption not enjoyed by other publications. Arkansas also discriminates in favor of local speech and against ideas from outside its borders, by granting an exemption from its tax to certain magazines only if they are printed and published in Arkansas.

Neither the court below nor the State in its Motion to Dismiss even attempted to justify the State's effort to "pick and choose" among members of the media in applying its tax. Both the Arkansas Supreme Court and the State avoid the issues in this case by asserting that the *Arkansas Times* cannot complain about a generally applicable tax and cannot object to exemptions granted to others. With respect to the media, however, the tax is clearly not generally applicable, and the *Arkansas Times* —like any claimant alleging that a statute is underinclusive—clearly has standing to object to discriminatory exemptions. Arkansas has offered no justification for its selective taxation of the media, and such a power in the State to tax some publications but not others on the basis of content or type of publication cannot withstand scrutiny under the First Amendment.

ARGUMENT

I. The Arkansas Selective Exemption Scheme Is An Invalid Content-Based Restriction on Freedom of the Press

"[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). *See Regan* v. *Time Inc.*, 468 U.S. 641, 648-649 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment"). Arkansas violates this bedrock principle of First Amendment jurisprudence by taxing some magazines and exempting others solely on the basis of the content of the magazines. It is well-established that a discriminatory tax imposed on speech or the press is a restriction on First Amendment freedoms. As this Court noted in *Speiser* v. *Randall*, 357 U.S. 513, 518 (1958), "[i]t cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." *See Grosjean v. American Press Co.*, 297 U.S. 233, 244-245 (1936) (discriminatory tax on the press analyzed as a "restraint" on the press).

If the articles in the *Arkansas Times* were devoted to religion or sports, the magazine would be exempt from the gross receipts tax. Since the articles deal with other subjects, the magazine must pay the tax. Arkansas "enforcement authorities must necessarily examine the content of the message that is conveyed" to determine whether an Arkansas publisher is to be taxed. *FCC* v. *League of Women Voters*, 468 U.S. 364, 383 (1984). Such official scrutiny of the contents of publications as the basis for imposing a tax strikes at the very heart of the First Amendment.

In any case involving content-based restrictions on First Amendment freedoms, the State "must show that its regulation is necessary to serve a compelling state

interest and that it is narrowly drawn to achieve that end." *Widmar* v. *Vincent*, 454 U.S. 263, 270 (1981). *See Minneapolis Star*, 460 U.S. at 582; *Larson* v. *Valente*, 456 U.S. 228, 246-247 (1982). The State faces a heavy burden in attempting to justify a content-based regulation, and the exacting test is rarely met. As the Court noted in *Bolger* v. *Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983), "[w]ith respect to noncommercial speech, this Court has sustained content-based restrictions only in the most extraordinary circumstances." [2]

Arkansas' scheme of selectively taxing and exempting particular members of the media on the basis of the content of their publications is not spared strict scrutiny simply because Arkansas does not discriminate on the basis of the particular views expressed in any journal.[3]

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[2] None of the examples cited in *Bolger* of permissible content-based restrictions—libel, obscenity, and "fighting words"—is pertinent in this case. The discrimination against the *Arkansas Times* is not based on any objectionable characteristic of the speech in the magazine, but solely on the fact that it is not limited to the favored topics of religion, sports, or professional and trade issues.

[3] The Court has applied less exacting scrutiny to subject matter restrictions in the limited context of cases involving nonpublic forums. *See, e.g., Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983); *Greer* v. *Spock*, 424 U.S. 828 (1976); *Lehman* v. *City of Shaker Heights*, 418 U.S. 298 (1974). As the Court noted in *Perry*, "[i]mplicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity." 460 U.S. at 49. This reasoning has, however, been strictly limited to cases involving claims of access to nonpublic forums. In applying more relaxed scrutiny in *Perry*, the Court was careful to distinguish cases that "do not concern access to government property," and noted that in one such case "the Court expressly distinguished our public forum cases, stating that 'the special interests of a government in overseeing the use of its property' was not implicated." 460 U.S. at 50-51 (quoting *Consolidated Edison Co.* v. *Public Service Comm'n*, 447 U.S. 530, 540 (1980). Those special interests are similarly not implicated in the present case, and accordingly the Arkansas tax scheme should be tested under the strict scrutiny generally applied to content-based restrictions.

Such an argument was raised and definitively rejected in *Consolidated Edison Co.* v. *Public Service Comm'n, supra.* In that case the Court considered a Commission ban on utility company bill inserts discussing nuclear power. The Commission argued that the ban was

> acceptable because it applies to all discussion of nuclear power, whether pro or con, in bill inserts. The prohibition, the Commission contends, is related to subject matter rather than to the views of a particular speaker. Because the regulation does not favor either side of a political controversy, the Commission asserts that it does not unconstitutionally suppress freedom of speech. [*Id.* at 537.]

The Court, however, struck down the ban, noting that the "First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic." *Id.* The Court emphasized that to "allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Id.* at 538. The same consequence would inevitably flow from allowing the government to tax discussion of some subjects while exempting others.

The principle that a State may not discriminate against protected speech on the basis of its content—even if the State remains neutral with respect to particular viewpoints—has been repeatedly reaffirmed by this Court. In *Carey* v. *Brown*, 447 U.S. 455 (1980)—decided the same day as *Consolidated Edison*—the Court held that a state statute prohibiting picketing of dwellings and residences, but exempting from its prohibition labor picketing, violated the First Amendment. The Court noted that "it is the content of the speech that determines whether it is within or without the statute's blunt prohibition," *id.* at 462, and stated that "[i]t is, of course, no answer to assert that the Illinois statute does not discriminate

on the basis of the speaker's viewpoint, but only on the basis of the subject matter of his message." *Id.* at 462 n.6. *Accord, Police Department of Chicago* v. *Mosley*, 408 U.S. at 95-96; *Cox* v. *Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring).

In *FCC* v. *League of Women Voters, supra*, the Court held that a ban on editorializing by publicly subsidized, noncommercial television and radio stations violated the First Amendment. The Court analyzed the restriction as a ban "defined solely on the basis of the content of the suppressed speech," rejecting the argument that the restriction should be upheld because it was "neutral" in the sense that Congress was not favoring one editorial viewpoint over any other. 468 U.S. at 383-384. In *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490 (1981), the Court struck down a municipal ban on outdoor advertising displays, in part because of exceptions to the ban based on the content of certain outdoor signs.[4] As the plurality noted, "[w]ith respect to noncommercial speech, the city may not choose the appropriate subjects for public discourse." *Id.* at 515. The plurality specifically rejected the argument that the ban and exemptions did not violate the First Amendment because they were "neutral" and do "not favor one side over another on a subject of public controversy." *Id.* at 518. That argument, the plurality noted,[5] had been clearly rejected in *Consolidated Edison. Id.* at 518-519.[6]

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[4] One of the exceptions—for signs carrying or displaying religious symbols—is particularly pertinent in light of the exemption in the Arkansas tax scheme for magazines devoted to religious subjects. *See* 453 U.S. at 514 (plurality opinion).

[5] Justices Brennan and Blackmun concurred in the judgment on the ground that the ban constituted a total ban on a medium of communication. 453 U.S. at 525-526. It was accordingly not necessary for them to consider the present question.

[6] *See also City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789 (1984), in which the Court upheld a ban on the

The Arkansas statute discriminates on its face against protected, noncommercial speech solely because of the content of the speech. As the foregoing cases clearly establish, it is wholly irrelevant that the statute does not distinguish among publications on the basis of the views expressed. Arkansas cannot favor speech on selected topics, by taxing speech on other topics, unless it can demonstrate that such a distinction is necessary to achieve a compelling state interest.

Nothing in *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), or *City of Renton* v. *Playtime Theatres, Inc.*, 106 S.Ct. 925 (1986), is to the contrary. In both cases the Court upheld zoning restrictions on adult theaters. The restrictions were imposed not on the basis of the content of the films but solely on the basis of the secondary effects of such theaters on the surrounding community. *See Young*, 427 U.S. at 71 n.34 (plurality opinion), *id.* at 82 n.6 (Powell, J., concurring in the judgment); *Renton*, 106 S.Ct. at 925-930. Arkansas has, of course, pointed to no peculiar or unique "secondary effects" of general interest magazines as opposed to sports or trade magazines that would justify differential treatment of them in a manner that burdens First Amendment rights. Even if any such "secondary effects" could have been shown, it is far from clear that they could justify the patent content-based discrimination in the Arkansas statute.

Nor is the Arkansas scheme spared strict scrutiny because the State grants a tax exemption to other mem-

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posting of signs on utility poles. The Court rejected the argument that the ban was overbroad and could have been drafted to permit posting of political posters, noting that "[t]o create an exception for * * * political speech and not * * * other types of speech might create a risk of engaging in constitutionally forbidden content discrimination." *Id.* at 816.

bers of the media that potentially might publish discussion of the same topics featured in the *Arkansas Times*. The State cannot contend that it is innocent of content-based discrimination among the media simply because it exempts one medium, newspapers, from the gross receipts tax regardless of the content of the subjects discussed in that medium. *See Virginia Pharmacy Board* v. *Virginia Consumer Council*, 425 U.S. 748, 757 n.15 (1976) ("We are aware of no general principle that freedom of speech may be abridged when the speaker's listeners could come by his message by some other means"). *See also Regan* v. *Taxation With Representation*, 461 U.S. 540, 553 (1983) (Blackmun, J., concurring) ("It hardly answers one person's objection to a restriction on his speech that another person, outside his control, may speak for him"). The fact that Arkansas does not discriminate on the basis of the content of newspaper speech cannot alter the fact that it does discriminate in determining the tax exempt status of certain magazines printed and published in Arkansas.

The applicability of the strict scrutiny test is further supported by this Court's recent decision in *Minneapolis Star*, *supra*. In that case the Court struck down on First Amendment grounds a Minnesota use tax imposed on the cost of paper and ink products consumed in the production of a publication. The Court concluded that a "tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest." 460 U.S. at 582.

The State has articulated no interest—compelling or otherwise—to support its content-based approach to taxation of the media. It is neither apparent nor explained why Arkansas must tax general interest magazines while exempting, for example, sports magazines and trade journals. The only interest the State has advanced has

been the general interest in raising revenue. Such an interest might justify taxation of the press generally, along with other business, but that is not the question before the Court. The State's admittedly important interest in raising revenue in no way explains its decision to tax some but not other publications, solely on the basis of content. The Court in *Minneapolis Star* recognized that the interest in raising revenue

> is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press. [460 U.S. at 586 (footnote omitted).]

Arkansas has not avoided First Amendment concerns by taxing businesses generally, or by exempting the media generally. Quite the contrary, Arkansas has decided to pick and choose among members of the media. If the interest in raising revenue cannot justify "special treatment of the press," it surely cannot justify special treatment of some members of the press, and Arkansas cannot claim to have avoided the "censorial threat implicit in a tax that singles out the press" by singling out only certain members of the press.

The court below misconceived the central issue in this case when it dismissed appellant's First Amendment argument with the cursory statement that the *Arkansas Times* was not immune from ordinary taxation for support of the government. App. to J.S. 12. This Court has stated that the publisher of a newspaper "must pay equitable and nondiscriminatory taxes on his business," *Associated Press* v. *NLRB*, 301 U.S. 103, 133 (1937) (dictum), that "[i]t is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support

of the government," *Grosjean* v. *American Press Co.*, 297 U.S. at 250 (dictum), and most recently that "our cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible," *Minneapolis Star*, 460 U.S. at 587 n.9 (dictum). A nondiscriminatory tax on the press, however, is simply not at issue in this case.[7] It is precisely and only the *discrimination* in the gross receipts tax to which the *Arkansas Times* objects.

The court below dismissed appellant's discrimination argument—a critical aspect of its First Amendment claim—on the curious ground that "[i]t is immaterial that an exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that would fall, not the tax against the *Times*." App. to J.S. 11. The State also pressed this argument in its Motion to Dismiss, at 5. This position—which would essentially preclude adjudication of any claim that a statute is underinclusive—is clearly contrary to logic and long-established law.

This Court has often, in a wide variety of contexts, considered claims of discrimination based on the assertion that others similarly situated were exempt from the operation of a law adversely affecting the claimant. *See, e.g.*, *Armco Inc.* v. *Hardesty*, 467 U.S. 638 (1984) (successful Commerce Clause challenge brought by out-of-state manufacturer on the ground that in-state manufacturers were exempt from state gross receipts tax), *Rostker* v. *Goldberg*, 453 U.S. 57 (1981) (unsuccessful equal protection challenge brought by males on the ground that females were exempt from draft registration law). In any such case in which it agrees with the claim, the Court simply holds the discriminatory scheme invalid.

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[7] If such a tax is permissible under the First Amendment, other constitutional limitations may nonetheless preclude its imposition in certain circumstances. *Cf. National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753 (1967).

It is true that the legislature can cure the discrimination either by making the exemption generally applicable or by eliminating the exemption, but a court cannot presume to know which option the legislature will choose. *See generally Orr* v. *Orr*, 440 U.S. 268, 272 (1979). In this case a favorable ruling would mean simply that Arkansas cannot impose its tax on the *Arkansas Times* while exempting other members of the media.[8]

Arkansas has presented no compelling reason for taxing some publications and exempting others, solely on the basis of the content of their speech. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Speiser* v. *Randall*, 357 U.S. at 518. That is precisely the effect of the challenged statute.

II. The Arkansas Selective Exemption Scheme Violates the First Amendment by Impermissibly Distinguishing Among Members of the Media

The Arkansas tax scheme violates the First Amendment by drawing arbitrary distinctions not only between different members of the same medium, but also between different media. The objectionable distinctions are not limited to those based on content, discussed above, but also include a distinction between newspapers and magazines, regardless of content. Newspapers are exempt from the gross receipts tax, Ark. Stat. Ann. § 84-1904 (f); magazines, unless they fall within the limited magazine exemption, *id.* § 84-1904(j), are not.

In *Minneapolis Star*, *supra*, this Court began its analysis by noting that the tax was "facially discriminatory" because "Minnesota has singled out the press for special treatment." 460 U.S. at 581-582. The tax at issue in

[8] The error of the court below is all the more remarkable in light of the fact that this Court in *Minneapolis Star* struck down the tax at issue in that case in large part because of an exemption from the tax available to small publishers. *See* 460 U.S. at 591-592.

this case is as "facially discriminatory" as the tax struck down in *Minneapolis Star*, and even more objectionable, since the discrimination is among members of the media rather than simply against the media as a whole. The Court in *Minneapolis Star* struck down the Minnesota ink and paper tax "not only because it singles out the press, but also because it targets a small group of newspapers." *Id.* at 591. Minnesota granted an exemption from its ink and paper tax for the first $100,000 of ink and paper consumed, which had the effect of imposing the tax on only a limited segment of the media—large publishers. *Id.* at 591 & n.15.[9] Here the selective application of the Arkansas gross receipts tax is even starker. Arkansas law does not contain a facially neutral exemption that has the indirect effect of imposing the tax on only a discrete segment of the media; on the contrary, Arkansas explicitly provides that its tax shall be imposed on some members of the media but not others.

The Court in *Minneapolis Star* went so far as to suggest that *no* state interest could be compelling enough to justify such differential treatment among members of the press: "[w]hatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." 460 U.S. at 591-592.

[9] The Court in *Minneapolis Star* had no occasion to address differential treatment of newspapers and magazines, as opposed to differential treatment based on the size of publication, since the Minnesota ink and paper tax applied to both newspapers and magazines. *See* 460 U.S. at 597 n.* (Rehnquist, J., dissenting). *Cf. Time Inc.* v. *Hulman*, 34 Ill.2d 344, 201 N.E.2d 374, 378 (1964) (construing state tax exemption for newspapers to apply to magazines as well because "[a]fter a full and careful consideration of the classes of newspapers and magazines disseminating news and information, we are of the opinion that there is no real or substantial difference between newspapers and plaintiffs' magazines").

See also id. at 593 (White, J., concurring on ground that exemption invalidates Minnesota tax). As the Court concluded, "[a] tax that singles out the press, *or* that targets individual publications within the press, places a heavy burden on the State to justify its action." 460 U.S. at 592-593 (emphasis supplied).

The State attempts to dismiss the significance of *Minneapolis Star* by arguing that "[a]ppellant has not been subject to a special tax as was at issue in *Minnesota Star* [sic] * * *." Motion to Dismiss 4. This argument misses the mark. As noted, the holding in *Minneapolis Star* was based on two independent and adequate grounds. The Minnesota tax on ink and paper used in publication was invalid because it was a special tax on the press and, quite apart from this concern, because the tax applied to some members of the press but not others. *See* 460 U.S. at 591, 592. In any event, while the Arkansas tax is applicable to many businesses in addition to the press, with respect to the press the exemptions—particularly the exemption for all newspapers—swallow the rule. The Arkansas tax, as applied to the media, is simply not a generally applicable tax. Arkansas has not availed itself of the option specified in *Minneapolis Star* of "taxing businesses generally." 460 U.S. at 586.[10]

The concerns expressed by the Court in *Minneapolis Star* over differential taxation of the press apply *a fortiori* to differential taxation among members of the press. "A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected." 460 U.S. at 585. That statement was made in the context of taxing the press differently than business as a whole. It applies with

[10] Indeed, in light of the large number of exemptions from the tax for other businesses and products, *see* Ark. Stat. Ann. § 84-1904, it would be inaccurate to describe the tax as a generally applicable tax, quite apart from the exemptions for selected members of the media.

even greater force to a power to tax some members of the media while exempting others. The concern in *Minneapolis Star* was that the State could threaten to impose burdensome taxes on the press as a whole, and "[t]hat threat can operate as effectively as a censor to check critical comment by the press." *Id.* Here Arkansas is claiming the far more insidious power to grant or withhold tax exemptions from specific segments of the media.[11] It would be a strange doctrine that held that a State may not impose differential taxes on the press, for fear of censorial effects, but was free to pick and choose which members of the media are subject to an otherwise generally applicable tax.[12]

[11] Other lower courts have recognized the teaching of *Minneapolis Star* that differentiation among the media raises particularly acute concerns under the First Amendment. In *City of Alameda* v. *Premier Communications Network, Inc.*, 156 Cal. App. 3d 148, 202 Cal. Rptr. 684, *cert. denied*, 105 S. Ct. 567 (1984), for example, the court struck down a municipal gross receipts license tax applicable to television subscription services, relying on *Minneapolis Star*. The court ruled that the city's interest in raising revenue "cannot, standing alone, justify special treatment of a segment of the media * * * when alternative means of achieving the same interest without implicating First Amendment concerns are available." 156 Cal. App. 3d at 156, 202 Cal. Rptr. at 689.

[12] The Arkansas tax also discriminates among the media on the basis of whether the publication is printed and published within Arkansas or outside the State. The exemption for religious, professional, trade, or sports magazines is only available to such magazines printed and published in Arkansas. Ark. Stat. Ann. § 84-1904(j). Although the issue has not been raised in this case, it is notable that this provision is clearly unconstitutional as a violation of the Commerce Clause, U.S. Const. art. I, § 8. In *Armco Inc.* v. *Hardesty, supra*, this Court held that a gross receipts tax on wholesaling from which local manufacturers were exempt violated the Commerce Clause. The present case, involving a gross receipts tax on sales from which certain local publishers are exempt, is indistinguishable from *Armco*. Quite apart from Commerce Clause concerns, a tax on the media that is levied on out-of-state publications but not on similar local publications raises serious First Amendment concerns. A State may not favor local views by imposing a tax on ideas from outside its borders.

Arkansas cannot defend its decision to impose a selective tax on magazines on the ground that it is merely according favorable treatment to newspapers. As this Court noted in *Buckley* v. *Valeo*, 424 U.S. 1, 48-49 (1976), "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."

In *First National Bank* v. *Bellotti*, 435 U.S. 765 (1978), the Court struck down on First Amendment grounds a state statute restricting corporate expenditures to influence the vote on public referendum issues. The Court declined to permit the State to restrict speech solely on the basis of the identity or form of the speaker, whether an individual, association, or corporation. "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.* at 784-785. In Arkansas, magazines may, of course, address public issues, but they pay a price for doing so that newspapers do not. Acceptance by this Court of a power in the State to impose taxes on selected segments of the media would be tantamount to acceptance of a power in the State "to channel the expression of views" that *Bellotti* held was incompatible with the First Amendment. *Id.* at 785. In a State, for example, where newspapers generally supported the political party in power but magazines did not, the power to tax only magazines would be an awesome one.[13]

[13] The distinction in the challenged statute between newspapers and magazines, and between "religious, professional, trade and sports" magazines and other magazines, requires Arkansas officials to review publications and make the often highly subjective determination as to what constitutes a "newspaper" as opposed to a "magazine," or whether a particular magazine qualifies as a religious, professional, trade or sports magazine. This Court has often recognized the danger that such subjective judgments pose to

Discrimination among the press, and not simply differentiation of the press, was an important characteristic of the taxes at issue in the two leading cases in which this Court invalidated taxes on the press. In *Grosjean* v. *American Press Co.*, 297 U.S. at 244-245, the Court struck down a license tax on the sale of advertising imposed only on those newspapers with a weekly circulation above 20,000. As this Court recognized in *Minneapolis Star*, the tax in *Grosjean* applied only to "a *selected group* of newspapers." 460 U.S. at 580 (emphasis supplied).[14] And the exemption for certain newspapers from the ink and paper tax at issue in *Minneapolis Star* was, as noted, an independent basis for invalidating that tax. 460 U.S. at 591-592. By contrast, the three cases in which this Court has summarily rejected challenges to taxes on the press all involved taxes that did not discriminate among the media.[15]

First Amendment freedoms. *See, e.g., Heffron* v. *International Society for Krishna Consciousness*, 452 U.S. 640, 649 (1981); *Schneider* v. *State*, 308 U.S. 147, 163-164 (1939); *Saia* v. *New York*, 334 U.S. 558 (1948). The problem is illustrated by *amicus'* publication Time Magazine, which regularly includes sections on religion and sports but which would probably not be considered by state officials to qualify as a religious or sports magazine.

[14] The Court in *Minneapolis Star* noted that the case before it could not be disposed of by "simple citation to *Grosjean*," since in *Minneapolis Star* there was no indication, "apart from the structure of the tax itself," of any impermissible motive on the part of the legislature. 460 U.S. at 580. There is similarly no extraneous evidence of legislative intent in this case, but, as *Minneapolis Star* makes clear and as noted above, the burden is on the State to justify a discriminatory tax of the sort at issue here. It is not necessary to establish illicit legislative motive to find a violation of the First Amendment, particularly when the tax has the effect of penalizing a "selected group" within the media. *See id.* at 592-593.

[15] *Arizona Publishing Co.* v. *O'Neil*, 22 F. Supp. 117, 118 (D. Ariz.), *aff'd mem.*, 304 U.S. 543 (1938); *Giragi* v. *Moore*, 49 Ariz. 74, 79, 64 P.2d 819, 821, *appeal dismissed*, 301 U.S. 670 (1937); *Tampa Times Co.* v. *City of Tampa*, 158 Fla. 589, 594, 29 So.2d 368, 370, *appeal dismissed*, 332 U.S. 749 (1947).

In its First Amendment decisions this Court has frequently recognized the wisdom of Justice Jackson's statement that "there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally." *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 112 (1949) (concurring opinion). *See, e.g., Minneapolis Star*, 460 U.S. at 585; *Larson* v. *Valente*, 456 U.S. at 245. The notion that the State abridges freedom of speech when it treats similarly situated speakers differently is basic to the First Amendment.[16] Such selective taxation of the media "places a heavy burden on the State to justify its action." *Minneapolis Star*, 460 U.S. at 592-593. The State has failed to articulate any reason —let alone a compelling reason—for this differential taxation, and, in any event, the "potential for abuse" inherent in such taxation is such "that no interest suggested by [the State] can justify the scheme." *Id.* at 592.

"When speakers and subjects are similarly situated, the State may not pick and choose." *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. at 55. In applying its sales tax to certain members of the media, Arkansas picks and chooses both among speakers and among subjects. Arkansas taxes some magazines but exempts all newspapers, discriminating among speakers. It taxes out-of-state magazines but exempts some local magazines, again discriminating among speakers. And it taxes some magazines but exempts others solely because of content, discriminating among subjects. In purporting to "pick and choose" among members of the media, Arkansas has violated the First Amendment.

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[16] A comparable situation exists with respect to the religion clauses of the First Amendment. Government may impose restrictions that are applicable to all religions, *United States* v. *Lee*, 455 U.S. 252 (1982), but may not draw distinctions among different denominations. *Larson* v. *Valente, supra.*

CONCLUSION

For the foregoing reasons, and those in the Brief of Appellant, this Court should reverse the decision below.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
DAVID J. SAYLOR
JOHN G. ROBERTS, JR.
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685
Counsel for Amicus Curiae
Time Inc.

* Counsel of Record

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No. 85-1370

In the Supreme Court of the United States

OCTOBER TERM, 1985

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

vs.

CHARLES D. RAGLAND,
Commissioner of Revenues,
Appellee.

ON APPEAL FROM A DECISION OF THE
SUPREME COURT OF ARKANSAS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CITY & REGIONAL MAGAZINE ASSOCIATION IN SUPPORT OF APPELLANT

DONALD M. MIDDLEBROOKS
Counsel of Record
THOMAS R. JULIN
JASON B. MEYER
STEEL HECTOR & DAVIS
Attorneys for the City & Regional Magazine Association
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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On Appeal From a Decision of the
Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE CITY & REGIONAL MAGAZINE ASSOCIATION IN SUPPORT OF APPELLANT

The City & Regional Magazine Association hereby respectfully moves for leave to file the annexed Brief *Amicus Curiae* in this case in support of Appellant, pursuant to Rule 36.3 of the Rules of this Court.

The Appellant has consented to the filing of this brief, and has filed its consent with the Clerk. Consent of Appellee was requested but refused.

INTEREST OF THE AMICUS CURIAE

The City & Regional Magazine Association (CRMA) is the national organization of general interest magazines which serve the population of specific geographical areas. The 39 magazines which comprise the active membership of CRMA have a total of over two-and-a-half million paying readers.[1] Because of the magazines' inherently local emphasis, almost all of these two-and-a-half million people buy the magazines in the state in which they are published, and almost all would therefore have to pay any sales tax applied to the sale of the magazines.

City and regional magazines are like local newspapers in many ways. Both kinds of publications disseminate information of general public interest, but focus on the concerns of the near-by populace. Both contain classified and display advertising. Both report on news via stories that vary in length and writing style, from "hard news" to short

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1. The member magazines of CRMA (and their approximate paid circulations) are: Arkansas Times (29,000); Atlanta Magazine (56,000); California Magazine (300,000); Chicago Magazine (220,000); Cleveland Magazine (50,000); Columbus Monthly (34,000); Connecticut Magazine (88,000); Country/Mid-Atlantic Magazine (100,000); D (Dallas) Magazine (80,000); Delaware Today Magazine (14,500); Denver Magazine (20,000); Detroit Monthly (44,000); Honolulu Magazine (25,000); Houston City Magazine (60,000); Indianapolis Monthly (30,000); KS (Kansas) Magazine (10,000); Louisiana Life (49,000); Louisville Magazine (20,500); Metropolitan Detroit (90,000); Miami/South Florida (29,000); Milwaukee Magazine (36,000); MPLS/St. Paul Magazine (47,000); NASHVILLE! (24,000); New England Monthly (85,000); New Jersey Monthly (95,000); New Mexico Magazine (90,000); North Shore Magazine (33,500); Oregon Magazine (30,000); Phoenix Metro Magazine (35,000); Pittsburgh Magazine (58,000); Sacramento Magazine (23,500); San Diego Magazine (58,000); San Francisco Focus (158,000); St. Louis Magazine (35,000); Texas Monthly (280,000); Toronto Life (95,000); The Washington (D.C.) Dossier (38,000); Washington (State) Magazine (68,000); West Michigan Magazine (22,000).

"features."[2] Both offer information on local activities, the arts, and restaurants.[3] Both feature political reporting and editorial opinion.[4] Indeed, because individual magazines and newspapers vary to a great extent, perhaps the most ubiquitous distinction between newspapers and city and regional magazines is the quality of the paper on which they are printed.

The interest of CRMA in this appeal is many-fold. First, the publication which is at the center of this case, the Arkansas Times magazine, is a member of CRMA.

Second, each of the 38 other member magazines which are members of CRMA are similarly situated to the Arkansas Times, and each of the 2.5 million paying readers of

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2. Indeed, in head-to-head competition, it is often the magazines that are considered the best source of news. For example, in recent judging, Washington Magazine won 19 awards for excellence in journalism from Sigma Delta Chi, including first place, third place, and honorable mention for "general news reporting"; Milwaukee Magazine received first place awards from the Milwaukee Press Club for best single background story and best locally written story; and D Magazine was cited by the Press Club of Dallas for best news story, and given the outstanding reporting awards of The National Association of Secondary School Principals and the Dallas Bar Association. *CRMA Communicator*, July, 1986, at 3.

3. A nearly universal feature of city and regional magazines is a calendar of entertainment and arts offerings for the local area, and an extensive listing of restaurant reviews. Courts have often recognized the public importance of this sort of consumer information, and that such information is entitled to First Amendment protection. *See, e.g., Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 485 n.1 (1984) (consumer magazine protected); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected.").

4. The public importance of information such as this has led courts to find First Amendment protection for political and editorial speech imperative. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ... U.S. ....., 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

CRMA member publications are similarly situated to the readers of the Arkansas Times. CRMA is thus interest in this case because it raises issues concerning the constitutional limits on the power of the states to discriminate between different industries and the press, and between different types of publications, for the purposes of applying a state sales tax.

Third, several members of CRMA are now involved in disputes with the taxing authorities of their states concerning the application of state sales taxes, and sales tax exemptions, to their publications—disputes quite similar to the one between the parties to this case. As the annexed brief demonstrates, in many states, members of CRMA are subject to sales taxes notwithstanding that other industries and other publications are exempt from the tax. In some instances, because city and regional magazines are by nature "general interest" publications, they, like the Arkansas Times, "fall between the cracks" of apparently broad tax exemptions.

Finally, the CRMA, a news media organization, is interested in the scope of the First Amendment's protections and concerned that its safeguards fully embrace those who report on matters of public concern in some format other than that of a traditional daily newspaper.

PERSPECTIVE OF THE AMICUS CURIAE

The issues before this Court in this case have implications extending far beyond the borders of the State of Arkansas. As the national organization of city and regional magazines, CRMA wishes to emphasize the broader, national ramifications of the questions now before the Court. To that end, the annexed Brief *Amicus Curiae*

surveys the sales tax codes in all 50 states and the District of Columbia, particularly noting that most states have historically exempted the sale of information which is of public concern from their sales taxes.

This brief also analyzes the nature of the Arkansas Gross Receipts Tax to determine whether it is a law of general applicability or a law which has been used to discriminate against the press as well as other industries.

Counsel for this *amicus* has consulted with counsel for the appellant and determined that the arguments advanced here are not duplicative of the arguments advanced in appellant's initial brief.

Respectfully submitted,

DONALD M. MIDDLEBROOKS
Counsel of Record
THOMAS R. JULIN
JASON B. MEYER
STEEL HECTOR & DAVIS
Attorneys for the City & Regional Magazine Association
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

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BRIEF AMICUS CURIAE OF THE CITY & REGIONAL MAGAZINE ASSOCIATION IN SUPPORT OF APPELLANT

INTEREST OF THE AMICUS CURIAE

The City & Regional Magazine Association (CRMA) stated its interest in this case in its motion for leave to file a Brief *Amicus Curiae* and incorporates that statement here by reference.

SUMMARY OF ARGUMENT

This Court has held the press may not be taxed differently than other enterprises in the absence of overriding interests of compelling importance.

The Arkansas Gross Receipts Tax is a tax which treats the press differently than other enterprises. Unlike

laws of general applicability which may be applied to the press, the Arkansas tax historically has been used for various policy reasons to encourage some industries and to discourage others.

Arkansas and numerous other states which also use their sales taxes for discriminatory purposes have recognized that application of this particular type of tax against the press infringes on First Amendment freedoms by exempting most publications from the tax which distribute news of public concern.

Refusing the Arkansas Times the protection which other publications are given abridges the First Amendment because the Arkansas Times also publishes matters of public concern.

The State of Arkansas has no overriding interests of compelling importance in imposing its Gross Receipts Tax on sales of Arkansas Times magazine, but not on the sales of other like publications and numerous other enterprises. Accordingly the tax abridges the First Amendment.

ARGUMENT

I.

The Arkansas Gross Receipts Tax Cannot Be Applied to Sales of the Arkansas Times Magazine Absent Overriding Interests

This Court made clear in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner*, 460 U.S. 575 (1983), that taxes which are not of general applicability may not be applied against the press absent overriding

state interests. An analysis of the Arkansas Gross Receipts Tax shows that, for purposes of constitutional analysis, it plainly cannot be labeled a tax of general applicability. It is a discriminatory tax, which like other state sales taxes, historically has not been applied against the press. In addition, the record shows that the Arkansas Times magazine is entitled to the same degree of First Amendment protection which newspapers received in *Minneapolis Star*. Therefore, the Arkansas Gross Receipts Tax, Ark. Stat. Ann. §§84-1901 et seq., may not be assessed against sales of the Arkansas Times magazine in the absence of overriding interests.

A. A Tax Which Treats the Sale of Information Differently From Other Sales May Not Be Upheld Absent Overriding Interests

"A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest."[1] In

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1. *Minneapolis Star*, 460 U.S. at 582 (1983). The City & Regional Magazine Association does not agree with the conclusion reached in dicta in *Minneapolis Star* that "a generally applicable sales tax" may be imposed against the press. 460 U.S. at 586 n.9. That opinion also stated that "Nothing . . . prevents the State from taxing the press in the same manner that it taxes other enterprises. It can achieve its interest in requiring the press to bear its share of the burden by taxing the press as it taxes others, so differential taxation is not necessary to achieve." *Id.* at 590 n.12. Both of these statements—which plainly were unnecessary to the decision before the Court, *id.* at 593 (White, J., concurring)—were based on an overly broad reading of *Breard v. City of Alexandria*, 341 U.S. 622 (1951), a case which upheld a penal ordinance prohibiting door-to-door solicitations, including solicitations by persons selling subscriptions to magazines. The *Breard* case involved no issue regarding taxation and did not, notwithstanding, the protests of the dissenters, disturb such cases as *Follett v. McCormick*, 321 U.S. 573 (1944), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), which had clearly held that a flat tax, such as the sales tax, cannot be imposed on the exer-

(Continued on following page)

striking down Minnesota's tax on the use of ink and paper, this Court established in *Minneapolis Star* that a tax such as that imposed by the Arkansas Gross Receipts Tax is a tax which burdens a right protected by the First Amendment.

This Court emphasized in *Minneapolis Star*, however, that the First Amendment provides no defense against a regulation of general applicability and cited a number of specific examples of cases where such challenges had been unsuccessful. 460 U.S. at 583. On the other hand, the Court held, "Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* at 585. As it did in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court rooted its *Minneapolis Star* decision in history. "There is substantial evidence," the Court concluded, "that differential taxation of the press would have troubled the Framers of the First Amendment." 460 U.S. at 583.

Footnote continued—

cise of a privilege granted by the Bill of Rights. "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him on the privilege of delivering a sermon. . . . The power to tax the exercise of a privilege is the power to control or suppress its employment." *Murdock*, 319 U.S. at 112. In *Breard*, the ban on solicitation was justifiable because it served the important public purpose of protecting the privacy and security of the home and it employed the least restrictive means possible to do so. Therefore, the ordinance was upheld even though it imposed an incidental restriction on First Amendment rights. Similarly, in the recent case of *Arcara v. Cloud Books, Inc.*, ____ U.S. ____, 54 U.S.L.W. 5060 (July 7, 1986), the Court upheld a criminal ordinance which required the one-year closing of places of prostitution, lewdness, or assignation, notwithstanding that it limited the petitioner's First Amendment right to sell books. But this Court invalidated the taxes on solicitation in *Follett* and *Murdock* because they bore no relationship to the goal of protecting the home from unwanted or dangerous persons; their sole objective was to raise revenue.

Today, then, there is no question that a tax which impacts the exercise of First Amendment rights differently than other activities cannot be justified except by overriding interests.[2] The primary issues for resolution in this appeal are therefore whether the Arkansas Gross Receipts Tax treats sales of the Arkansas Times magazine differently from other sales and, if so, whether the Arkansas Times magazine is protected by the First Amendment.

B. The Arkansas Gross Receipts Tax Treats Sales of the Arkansas Times Magazine Differently From Other Sales

The Arkansas Gross Receipts Tax historically has been used, for policy reasons, to discriminate between different industries, rather than to impose an even-handed tax burden on all taxpayers. This feature of the tax makes it unlike any laws of general applicability which this Court has found inoffensive to First Amendment interests and it creates threats to press freedom which are as great as those created by the Minnesota use tax which this Court held unconstitutional. Therefore, the Court should conclude that the Arkansas tax treats sales of the Arkansas Times differently from the sales of other goods or services.

2. The *Minneapolis Star* decision also concluded that "Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers." 460 U.S. at 592. The Arkansas Gross Receipts Tax suffers from a similar defect. The focus of this brief, however, is the rule which prohibits taxing of the press differently than other enterprises. The point regarding discrimination between different sectors of the press is discussed in detail in the Appellant's brief. CRMA concurs in the arguments advanced therein.

1. The Arkansas Tax Has Been Used to Favor Some Industries Over Others

Arkansas, like the District of Columbia and the 44 other states which tax the sale of tangible personal property,[3] specifically exempts numerous types of sales from the tax.[4] For example, the tax is not imposed on the sale of cotton,[5] the sale of machinery for use in designated enterprise zones,[6] gate receipts from rodeos,[7] the sale of baby chickens,[8] the rental or lease of equipment used in filming certain motion pictures,[9] certain sales to the Boy Scouts of America, Girl Scouts of America, Boys and Girls Clubs of America, the Poets' Roundtable of Arkansas, 4-H Clubs, FFA Clubs, and Future Farmers,[10] as well as the sale of newspapers and four types of publications.[11]

These exemptions, and numerous others,[12] generally reflect policy decisions to promote particular industries,

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3. Only Alaska, Delaware, Montana, New Hampshire, and Oregon do not impose a sales tax.

4. Ark. Stat. Ann. §84-1904 (1985) lists thirty-six exemptions. *See also* The Commerce Clearing House *State Tax Guide* (1986) which provides a convenient summary of all state tax codes and lists the numerous exemptions to each state sales and use tax.

5. Ark. Stat. Ann. §84-1904(m) (1985).

6. Ark. Stat. Ann. §84-1904(r)(2)(B) (1985).

7. Ark. Stat. Ann. §84-1904(k) (1985).

8. Ark. Stat. Ann. §84-1904(r)(2)(E) (1985).

9. Ark. Stat. Ann. §84-1904(w) (1985).

10. Ark. Stat. Ann. §84-1904(g) (1985).

11. Ark. Stat. Ann. §84-1904(f) and (j) (1985).

12. Ark. Stat. Ann. §84-1904 (1985) lists approximately 36 categories of exemptions.

groups, or activities.[13] Cotton always has been a staple of the Arkansas economy, therefore the Arkansas General Assembly exempts the sale of cotton, seed cotton, lint cotton, and baled cotton from the sales tax. In enacting this exemption, the Arkansas Legislature explained: "The production and sale of cotton and cotton seed in this State, being the State's major industry and being essential to the commercial life of the State, it is the intention of this Act that no sale thereof in this State shall be subject to a sales tax."[14] Similar declarations of intention were authored for the baby chickens and enterprise zone exemptions.[15] All such statements reveal the Assembly's purposeful use of its sales tax to accomplish its political objectives.[16]

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13. This Court has permitted state legislatures broad discretion in using their tax codes to implement rational policy objectives where fundamental interests are not affected. *Williams v. Vermont*, ... U.S. ....., 105 S.Ct. 2465, 2472 (1985); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547-48 (1983). However, where a tax classification affects a fundamental interest, closer scrutiny of the discrimination has been required. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336-42 (1972) (right to travel); *Graham v. Richardson*, 403 U.S. 365 (1971) (suspect criteria); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to vote); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (suspect criteria).

14. 1937 Ark. Acts 189 (Pope's Digest §14093).

15. In enacting the baby chicken exemption, the Legislature declared: "[T]he production and sale of baby chickens is one of the newest and most important industries within the State of Arkansas . . . . [I]t is imperative that this General Assembly assist this new industry in every way possible so that it may be competitive with similar industries of other states." 1949 Ark. Acts 15 §3. In explaining the exemption of machinery purchased for use in "enterprise zones," the Legislature stated: "It is the intent of this Act to provide the foregoing exemptions as incentives to encourage the location of new manufacturing plants in Arkansas, the expansion of existing manufacturing plants in Arkansas, and the modernization of existing manufacturing plants in Arkansas through the replacement of old, inefficient, or technologically obsolete machinery or equipment." 1983 Ark. Acts 870 §3.

16. Arkansas is not alone in using its sales tax to accomplish discrimination between industries. Many states exempt

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These exemptions do not remain static, but rather come and go with a high degree of frequency. The compiler's notes following section 84-1904 reflect that the list of exemptions found in the Arkansas Statutes has been amended by 29 separate acts of the Arkansas General Assembly since 1941, including nine acts in the last six years. Arkansas' practice of frequently altering its list of sales tax exemptions, adding some and retracting others, is not unusual. This holds true in many other states as well.[17] The fluidity of these laws has led one state bar association to describe its state sales and use tax as a "law by exemption."[18] The "potpourri of exemptions," the association concluded, results both from "a good faith effort by the legislature to impose a just and uniform tax on all the residents of this state, . . . the political process and the impact of special interest groups."[19]

In addition to the ordinary exemptions for the sale of particular "property," Arkansas[20] and many other states[21]

Footnote continued—

their favorite industries. *See, e.g.*, Iowa Code Ann. §422.45(26) (West 1986) (sales to farmers of farm equipment and machinery); Ky. Rev. Stat. §139.531 (1984) (horses for breeding); Md. Ann. Code art. 81, §326 (1957) (crab bait; sales of crab and seafood for off-premises human consumption); N.C. Gen. Stat. §105-164.13 (1985) (tobacco sold to manufacturers); Tex. Tax Code Ann. §151.324 (Vernon 1982) (equipment used for mineral exploration or production).

17. For example, Florida's list of exemptions, Fla. Stat. §212.08 (1985), has been amended 81 times since 1949.

18. *Fla. State & Local Taxes*, Vol. I ¶14.03[4] (Fla. Bar 1984).

19. *Id.*

20. The Arkansas Sales Tax applies generally to sales of tangible personal property. The tax does not apply to personal or professional services except for certain services delineated in the statute. *See* Ark. Stat. Ann. §84-1903 (1985).

21. *See, e.g.*, Conn. Gen. Stat. Ann. §12-412(11) (West 1986); Fla. Stat §212.08(7) (1985); Mich. Stat. Ann. §7.525(1) (Callaghan 1986); S.D. Codified Laws Ann. §10-45-12.2 (1982).

do not treat the sale of personal or professional services as a sale of tangible personal property. Thus, the sale of a lawyer's brief, an architect's plans, or a doctor's prescription goes untaxed notwithstanding that all of the transactions are accompanied by the transfer of some incidental tangible property.[22] Oddly, the parties and the Arkansas Supreme Court seem to agree that the sale of the journalist's work product does not fall within this broad exemption to the general scheme of taxation.[23]

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22. *See Larey v. Dungan-Allen, Inc.*, 428 S.W.2d 71, 73 (Ark. 1968).

23. It is difficult to understand why the journalist's work product should not be treated as a service. In 1939, before Arkansas had exempted the sale of any publications from its tax, the Arkansas Attorney General delivered an opinion to the Commissioner of Revenues indicating that "the sale of a newspaper is the sale of service and not tangible property and is therefore not subject to the 2% sales tax." State of Arkansas, *Biennial Report of the Attorney General For the Biennial Period 1937-39* at 42. In *Larey, supra* note 22, the Supreme Court of Arkansas rejected an argument that the sale of photographs should be treated as the rendering of services rather than the sale of tangible personal property. "No doubt," the court held, "the photographers' experience and skill are essential to their work, but it is plain enough that the company's customers would not ordinarily pay for the exercise of that skill if it did not enhance the value of the end product." *Id.* at 73. But the Court went on in *Larey* to distinguish physicians' x-rays and architects' blueprints from photographs. The court wrote, "By contrast, a physician is engaged to diagnose and treat illnesses, not to produce and sell x-rays. An architect is employed to design and supervise the construction of buildings, not to produce and sell blueprints." *Id.* Other state courts have concluded that services which are incorporated in printed material are nontaxable. For example, the Illinois courts concluded that printers who receive copy for printed matter and who contract to print are not engaged in the business of selling tangible personal property. *A.B.C. Electrotype Co. v. Ames*, 364 Ill. 360, 4 N.E. 2d 476 (1936); *H. G. Adair Printing Co. v. Ames*, 364 Ill. 342, 4 N.E.2d 481 (1936), and *J. A. Burgess Co. v. Ames*, 359 Ill. 427, 194 N.E. 565, 566 (1935). *Burgess* stated: "It should be apparent that letterheads, circulars, mail-order catalogs, printed briefs for an attorney, or any other special printed matter, would be without commercial value, and it follows that the printer is engaged

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The sale of the journalist's work product—at least when it takes the form of a general interest magazine published within the State of Arkansas—is treated in an almost unique fashion as a "tangible sale of personal property" which is subject to the sales tax unless exempt. Of course, the Arkansas Supreme Court established in the instant case that sales of the appellant's publication do not fall within the Arkansas exemptions for newspapers or certain types of magazines.[24]

2. The Arkansas Tax Is Not of General Applicability

Compared to other laws which the press has challenged as abridging First Amendment rights, but which this Court

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only in service." *Id. Burgess* further observed, "We can perceive no logical difference between the paper upon which a photostatic copy of something is made or a blueprint produced, and that paper which a lawyer uses for writing a will or deed, a doctor for writing a prescription, or an abstractor for showing a chain of title. The paper is a mere incident; the skilled service is that which is required." In *Long v. Roberts & Son*, 3 Div. 212, 176 So. 213 (Ala. 1937), the Supreme Court of Alabama accepted an argument that the work of lithographing, copper plate engraving, and steel die embossing—commercial printing—and book binding do not constitute "selling at retail any tangible personal property," but are essentially services for which no tax is imposed. *See also Southern Bell Telephone and Telegraph Co. v. Department of Revenue*, 366 So.2d 30, 34 (Fla. 1st DCA 1978) (a sale should be treated as a sale of service if the only goods involved in the transaction "have only paper value apart from the information or events they record") (Smith, J., dissenting). *But see Eagerton v. Dixie Color Printing Corp.*, 421 So.2d 1251, (Ala. 1982) (holding the sale of a newspaper to the public is a retail sale of tangible property).

24. If this Court concludes, however, that the Arkansas tax may not constitutionally be imposed on sales of the Arkansas Times magazine, the Court should find that those sales are exempt from the tax. Arkansas Acts §84-1904(1) specifically exempts "Gross receipts or gross proceeds derived from sales for resale which the State is prohibited by the Constitution and Laws of the United States for taxing, or further taxing . . . ."

has upheld because of their equal impact on all enterprises, the Arkansas Gross Receipts Tax is dramatically different.

For example, in *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), and *Associated Press v. United States*, 326 U.S. 1 (1945), the Court rejected arguments that the antitrust laws abridge the First Amendment. But unlike state sales taxes, the antitrust laws had not historically been riddled with "favored industries" exemptions. In *Citizen Publishing*, the Court, in emphasizing the general nature of the antitrust laws, cited a House Subcommittee report which identified only "[p]iecemeal exemptions." *Id.* at 139 n.4. Congress enacted none of the identified exemptions to encourage particular favored industries, but rather because application of the laws to the exempted activities would be impractical or impossible or because the exempted industries were subject to other regulations.[25] Nor has there been a tradition of exempting newspapers or magazines from the operation of the antitrust laws as has been true of sales taxes.[26]

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25. *See, e.g.*, 15 U.S.C.A. §1012(b) (1973) (McCarran-Ferguson Act exempting the "business of insurance"); 46 U.S.C.A. §814 (1973) (allowing the Federal Maritime Commission to approve certain maritime transactions); 15 U.S.C.A. §13(c) (1973) (Non-profit Institutions Act). In explaining the nature of the exemptions to the nation's antitrust laws, two leading authors have observed; "Competition enforced by the antitrust laws is sometimes thought impossible or inappropriate. Accordingly, special statutes have been enacted to modify, complement, or displace the competitive premises and rules of the antitrust laws. The normal antitrust standard may be expressly modified in relatively limited particulars." P. Areeda & D. Turner, *Antitrust Law* ¶221 at 133 (1978).

26. *See Part I. C.* of this brief, *infra*. It was only subsequently that Congress enacted a limited exemption to the antitrust laws to permit failing newspapers to enter into joint operating agreements. 15 U.S.C.A. §1801 (1973). The Newspaper Preservation Act was a direct reaction to the Court's position in *Citizen Publishing*. *Committee for an Independent P-I v. Hearst Corp.*, 704 F.2d 467, 473-74 (9th Cir. 1983).

The *Minneapolis Star* decision also relied on *Breard v. Alexandria,* 341 U.S. 622 (1951), and *Branzburg v. Hayes,* 408 U.S. 665 (1972), as examples of cases where "generally applicable" regulations had been upheld notwithstanding their impact on First Amendment rights. Both of those cases involved statutes to which there were no exemptions at all. Thus the regulations at issue in these two cases are materially different from the Arkansas Gross Receipts Tax.[27]

The ordinance at issue in *Breard* imposed a blanket prohibition on all door-to-door solicitations and had never exempted solicitations for the sale of periodicals.[28] The issue in *Branzburg* was whether a reporter, like all other citizens, must comply with a grand jury subpoena.[29]

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27. In a series of recent cases decided after *Minneapolis Star,* the Court has upheld criminal ordinances, notwithstanding their impact on First Amendment rights, on the theory that individuals may not "claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities." *Arcara v. Cloud Books, Inc.,* ..... U.S. ....., 54 U.S.L.W. 5060, 5062 (July 7, 1986) (order requiring one-year closing of bookstore found to be place of prostitution); *United States v. Albertini,* 472 U.S. ....., 105 S.Ct. 2897, 83 L.Ed.2d 504 (1985) (order barring protester from military base for improper conduct); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288 (1984) (ban on sleeping in park as applied to demonstrators against plight of the homeless). All of the regulations at issue in these cases, like the regulations in *Breard* and *Branzburg,* also truly were of general applicability in that they had not historically exempted the particular forms of expressive activity at issue nor had they exempted particular industries or speakers for political purposes.

28. The ordinance at issue in *Breard* applied to all "solicitors, peddlers, hawkers, itinerant merchant or transient vendors." 341 U.S. at 624. An ordinance of less broad applicability was struck down in *Martin v. Struthers,* 319 U.S. 141 (1943).

29. *Id.* at 685. The Court stated: "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas *as other citizens do* and to answer questions relevant to an investigation in the commission of a crime." *Id.* at 682 (emphasis added). Subsequent to *Branzburg,* a majority of jurisdictions have, however, recognized such a privilege either by statute or judicial interpretation.

The *Minneapolis Star* decision cited *Associated Press v. National Labor Relations Board,* 301 U.S. 103 (1937), as another case for the proposition that a generally applicable tax could be applied to the press. In that case, AP argued that it must have unrestricted freedom, including freedom from the requirements of the National Labor Relations Act, 29 U.S.C.A. §141 et seq. (1973). The Court held, however, "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws." *Associated Press,* 301 U.S. at 132.

The National Labor Relations Act also is truly a regulation of general applicability. The few categories of exempt employers or employees which do exist have been found to be justified not because of any political favoritism toward them, but rather because the purposes of the Act would not be served by applying the Act to them. In *North Whittier Heights Citrus Association v. NLRB,* 109 F.2d 76, 80 (9th Cir. 1940), the court of appeals explained there is a "common denominator" to the exemptions in this Act. Acccording to the court, Congress exempted only employees who would not be "suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain." *Id.*

Minneapolis Star lastly relied on *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946), and *Mabee v. White Plains Publishing Co.,* 327 U.S. 178 (1946), in support of the theory that generally applicable taxes are constitutional. In these cases, the Court expressly rejected an argument that the existence of some exemptions to the Fair Labor Standards Act made application of the Act to the press unconstitutional.

In footnote, however, the *Minneapolis Star* opinion rejected the State of Minnesota's argument that the *Oklahoma Press* decision established that "the press cannot successfully challenge regulations on the basis of the exemption of other enterprises." 460 U.S. at 585 n.5. The Court pointed out, "The exempt enterprises in *Oklahoma Press* were *isolated exemptions and not the rule.*"[30] *Id.* (emphasis added). As discussed in point I.B.1. of this argument, exemptions have been the rule rather than the exception when it comes to applying the state sales tax.

3. The Arkansas Tax Poses As Great a Threat to Press Freedom As the Minnesota Use Tax

In each of the cases discussed in the preceding section, the Court found that the regulations at issue did not violate the First Amendment because of their general applicability. When confronted with the tax at issue in *Minneapolis Star,* however, the Court reached the conclusion that the use tax imposed by Minnesota on print and ink could not be so characterized. Although the Arkansas and Minnesota taxes are in some ways distinguishable, a direct comparison of the two taxes discloses that the discriminatory nature of the Arkansas tax creates many of the same threats to First Amendment freedoms as did the Minnesota use tax.

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30. As is true of the exemptions to the antitrust laws, exemptions to the Fair Labor Standards Act do not exist for the purpose of favoring particular industries over others. "The section of the Act granting exemptions deals with employment of a character or with employees of a class to which application of the provisions of the Act for minimum wages and maximum hours is either impractical or impossible, or with employees in occupations in which the conditions of labor are regulated by other statutes, or with employees the greater part of whose labor is in intrastate commerce." *Helena Glendale Ferry Co. v. Walling,* 132 F.2d 616, 619 (8th Cir. 1942).

The *Minneapolis Star* decision identified three distinct dangers which the Minnesota use tax imposed on the press because that method of taxation was not generally applied to other taxpayers. First, the Court held that such a tax "may be used to destroy a selected group of taxpayers by burdensome taxation." 460 U.S. at 585. Second, the Court found the tax could "operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id.* Finally, the Court held the tax "suggests that the goal of the regulation is not unrelated to the suppression of expression, and such a goal is presumptively unconstitutional." *Id.* The Arkansas tax also creates all of these threats to press freedom.

Many newspapers and magazines are only marginally profitable or not profitable at all. Among the least profitable publications are those which espouse politically unpopular viewpoints or which appeal to a fairly small segment of the population. For these publications, the issue of whether they must pay the sales tax is an issue of survival. In essence, many of these publications will continue to exist only if they are untaxed. If application of the Arkansas tax to sales of the Arkansas Times is sustained in light of the legislature's free discrimination between industries, no marginally profitable publication will be safe. When a tax is discriminatory, like the Arkansas tax, none of the safeguards which accompany regulations of general applicability comes into play. The tax could easily then be imposed on any presently exempt publications without imposing the tax on those favored industries which enjoy existing or future exemptions.

In addition, the power to exempt or repeal exemptions to this tax can be used as a perpetual threat against news-

papers or magazines. How many editorials will go unwritten, how many investigations will be left undone, how many profiles of political personalities will be discarded because of the economic fears that the sales tax exemption for particular types of publications, or all publications, will be amended out of the statute next year? Under the rational basis standard, the potential for political abuse, if only by the perpetual and undetectable threat to eliminate the existing exemption in the annual sales tax amendment process, is so great that that standard cannot apply. Generally applicable business regulations which have not historically been used as political carrots or sticks and which historically have been as fully applicable to the press as to any other industry pose no similar threat.

Even if the state could articulate some rational basis for treating sales of the Arkansas Times magazine differently than the sales of numerous other properties and services, the differential treatment in and of itself suggests that the Arkansas General Assembly is attempting to regulate expressive activity, as was the case in Minnesota.

Perhaps the strongest argument for attempting to distinguish the Arkansas and Minnesota taxes is that Arkansas is applying a sales tax to the sale of magazines rather than a "use tax."[31] But as shown by the analysis above this point of distinction is of very little importance because

31. Although the Minnesota tax at issue in *Minneapolis Star* was characterized as a "use tax," the Court pointed out that the tax at issue was really not the same type of tax as a "use tax" at all. A "use tax" generally is used solely for the purpose of "protect[ing] the State's sales tax by eliminating the residents' incentive to travel to States with lower sales tax to buy goods rather than buying them in Minnesota." 460 U.S. at 577. The Minnesota tax in *Minneapolis Star*, however, was not used for this purpose at all. Rather, it was used precisely for the same purpose as the sales tax—to raise revenue.

the historical discriminatory nature of the Arkansas tax creates the same dangers as the Minnesota tax created.

In addition, although this Court referred to the Minnesota tax as "singling out the press," that tax was no more directed at the press alone than is the Arkansas tax. The Minnesota use tax applied without exception to all industries and to all nonexempted uses of tangible personal property.[32]

C. In Recognition of the Constitutional Dangers of Imposing the Sales Tax on the Press, Arkansas and Other States Have Not Generally Done So

The Arkansas Gross Receipts (Sales) Tax Act has not historically been applied to most sales of information of importance to the citizens of Arkansas. Section 84-1904 provides that the following receipts or proceeds are exempt:

> (f) Gross Receipts or Gross Proceeds derived from the sale of newspapers . . . ."
>
> * * *

32. The first paragraph of the statute at issue in *Minneapolis Star*, Minn Stat. §297A.14 (1982) provided: "For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 [the sales tax] was paid on said sales price." It was this tax which was applied to the press by virtue of an amendment which provided that "Notwithstanding any other provisions of section 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication . . . is subject to the tax imposed by this section."

(j) Gross Receipts or Gross Proceeds derived from the sale of religious, professional, trade and sports journals and/or publications published and printed within this State and when sold through regular subscriptions.

These exemptions have been a part of the Arkansas statutes almost since the sales tax was first imposed.[33] A survey of other state tax codes reflects that the Arkansas exemption for newspapers and some other publications is not unprecedented. Most of the states which impose a sales tax also have provided at least some type of exemption for the sale of newspapers, magazines or other sales of information which is deemed to be important to the citizens of the particular state.[34] These exemptions generally also

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33. When Arkansas first enacted its sales tax, 1935 Ark. Acts 233, it made no exemption for sales of publications. However, as noted in footnote 23 *supra*, the Attorney General of Arkansas concluded in 1939 that the sale of a "newspaper" is not the sale of tangible personal property and therefore not taxable. The "newspaper" exemption was added by Acts of Arkansas 1941, No. 386, section 4. The "journals and/or publications" exemption was added by Acts of Arkansas 1949, No. 152.

34. The States have not, however, been uniform in their attempt to define which information providers should be exempt and which should be non-exempt. *See* Ariz. Rev. Stat. Ann. §42-1317A.7 (1985) (magazines or periodicals or publications encouraging tourist travel); Ark. Stat. Ann. §84-1904(f) & (j) (1947) (gross receipts or gross proceeds from sale of newspapers; religious, professional, trade and sports journals and/or publications printed and published in-state and sold through regular subscriptions); Cal. Rev. & Tax. Code §6362 (West 1970) (newspapers or periodicals regularly issued); Conn. Gen. Stat. Ann. §12-412(6) (West 1986 Supp.) (magazine subscriptions and newspapers circulated among the public); D.C. Code Ann. §47-2005(6), §47-2001(r) (1981) (newspapers and publications for religious, scientific, charitable, or educational purposes); Fla. Stat. §212.08(6) & (7)(e) (1985) (newspapers and magazine subscriptions); Idaho Code §63-3622I (1985) (religious literature, pamphlets, periodicals, tracts and books published and sold by a bona fide church or religious denomination); Ind. Code Ann. §6-2.5-5-17 (Burns 1984) (newspapers);

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Iowa Code Ann. §422.45.9 (West 1986) (newspapers, free newspapers, or shoppers' guides); La. Rev. Stat. Ann. §47:305(4)(a)(v) (West 1986) (newspapers); Me. Rev. Stat. Ann. tit. 36, §1760.13 & .14 (1964) (bibles and publications issued at average intervals); Md. Ann. Code art. 81, §326(n) (1957) (printing and sales of newspapers of any and all types); Mass. Gen. Laws Ann. Ch. 64H, §6(m) (West 1969) (newspapers, magazines, books required for instructional purposes in educational institutions, books used for religious worship, publications of any non-profit corporation, foundation, organization or institution); Mich. Stat. Ann §7.525(h) (Callaghan 1986) (newspapers and periodicals delivered via second-class mail; any newspaper or periodical of general circulation established not less than two years and published not less than once a week); Minn. Stat. Ann. §297A.25(i) (West 1986) (any publication regularly issued at average intervals excluding magazines and periodicals sold over the counter); Miss Code. Ann. §27-65-111(b) (1972) (daily or weekly newspapers; periodicals or publications of scientific, literary or educational organizations exempt from federal income taxation); Mo. Ann. Stat. §144.030.2 (10) (Vernon 1986) (newsprint used in newspapers published for dissemination of news); Neb. Rev. Stat. §77-2704(d) (1985) (any regularly issued newspaper published at intervals not exceeding one week provided they contain matters of general interest and reports of current events); Nev. Rev. Stat. §372.315 (1981) (tangible personal property which becomes an ingredient or component part of any regularly issued newspaper); N.J. Stat. Ann. §54:32B-8(e) (West 1985) (newspapers, magazines, and periodicals); N.M. Stat. Ann. §7-9-63, §7-9-64 (1978) (newspapers and magazines); N.Y. Tax Law §115(a)(5) (McKinney 1986) (newspapers and periodicals); N.C. Gen. Stat. §105-164.13 (14) & (28) (1985) (Holy Bibles; newspapers sold by street vendors and door-to-door deliveries; magazines sold door-to-door); N.D. Cent. Code §57-39.2-04 (25) (1983) (Bibles, hymnals, textbooks, and prayerbooks sold to nonprofit religious organizations); Ohio Rev. Code Ann. §5739.02(B)(4) (Page 1985) (newspapers; magazine subscriptions shipped by second class mail); Okla. Stat. Ann. tit. 68, §1357(c) (West 1985) (carrier sales of newspapers and periodicals; sales of newspapers and periodicals; sales of newspapers and periodicals where any individual transaction does not exceed seventy-five cents); Pa. Stat. Ann. tit. 72, §3403-203(t)(v) (Purdon 1964) (religious publications sold by religious groups; bibles; periodicals and publications published at regular intervals); R.I. Gen. Laws §44-18-30(B)(HH)(QQ) (1985 Supp.) (periodicals; bibles; promotional and product literature of boat manufacturers); S.C. Code Ann. §12-35-550(7) (Law. Co-op. 1976) (newsprint paper; newspapers; religious publications); S.D. Codified Laws Ann. §10-45-12.1 (1986 Supp.) (newspaper sales and subscriptions); Tenn. Code Ann. §§67-6-323, 329 (3) (1983) (religious publications; newspapers); Tex. Tax Code Ann. §§151.319, 320 (Vernon 1982) (newspapers; magazine

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have been a part of the sales tax codes from the time that the states first imposed the taxes.[35]

These statutes can be interpreted in several ways. First, they plainly reflect a general consensus of the nation's legislators that the flow of information about matters of public concern should not be impeded by the imposition of sales taxes. Second, these exemptions can be interpreted as a conclusion by the states that imposition of their sales taxes on newspapers and magazines is constitutionally proscribed. Most of the states enacted sales taxes after this Court announced its decision in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and most of those

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Footnote continued—

subscriptions entered as second class mail); Utah Code Ann. §59.15-4(b)(1) (1985) (newspapers); Vt. Stat. Ann. tit. 32, §9741(15) (1981) (newspapers with at least 10 percent news of general interest); Va. Code §58.1-608(13) (1950) (any daily or regularly issued publication excluding newsstand sales of the same); Wash. Rev. Code Ann. §82.08.0253 (1981) (newspapers); W.Va. Code §11-15-9 (1983) (sales of newspapers delivered by route carriers); Wis. Stat. Ann. §77.54(15) (West 1985) (newspapers and regularly issued periodicals); Wyo. Stat. §39-6-405 (xxi) (1977) (sale of newspapers).

35. The following is a compilation of the session law which first enacted the sales tax exemption referred to in note 34 *supra*. 1935 Ariz. Sess. Laws ch. 77; 1941 Cal. Stats. ch. 247 p. 1348 §28; 1948 Conn. Acts 1 §§5-7 (Spec. Sess.); 63 Stat. 115, ch. 146, tit. I, §128 (1949); 1949 Fla. Laws ch. 26319, §8; 1965 Idaho Sess. Laws ch. 195, §22(e)&(j); 1963 Ind. Act. ch. 30, §4 (Spec. Sess.); 1970 Iowa Acts ch. 1201 §2; 1948 La. Acts 9, §5(d); 1951 Me. Laws ch. 250, §10 XI & XII; 1947 Md. Laws ch. 281, §261(n)&(o); 1967 Mass. Acts ch. 757 §6(m); 1950 Mich. Pub. Acts 10 §4a(h); 1967 Minn. ch. 32, art. 13, §25(i) (Spec. Sess.); 1978 Miss. Laws ch. 347 §8(b); 1939 Mo. Laws p. 855 §3; 1967 Neb. Laws, sec. 4(d); 1969 Nev. Stat. ch. 306 §9; 1966 N.J. Laws ch. 30 § 8(e); 1969 N.M. Laws ch. 144 §§53 & 54; 1967 N.Y. Laws ch. 93 §1115(5); 1957 N.C. Laws ch. 1340 §5; 1967 N.D. Sess. Laws ch. 459 §29; 1933 Ohio Laws H.B. 134 §2; 1981 Okla. Sess. Laws ch. 313; 1963 Pa. Laws No. 43 §11; 1947 R.I. Pub. Laws ch. 1887 §31B; 1951 S.C. Acts No. 379 p. 686; 1935 S.D. Sess. Laws ch. 205 §34(a); 1947 Tenn. Pub. Acts ch. 3 §6; 1941 Tex. Gen. Laws ch. 184; 1969 Vt. Acts No. 144, subch. 2; 1966 Va. Acts ch. 151; 1935 Wash. Laws ch. 180 §19(c); 1974 W. Va. Acts ch. 136; 1969 Wis. Laws ch. 154 §260; 1979 Wyo. Sess. Laws ch. 41 §1.

enactments included exemptions for newspapers and magazines in their original form.. It therefore logically can be inferred that state legislatures have concluded *Grosjean* makes taxation of the sale of information—at least through imposition of their selectively applied sales taxes —impermissible.

The *Grosjean* decision itself cited an attempt by a state legislature to tax newspapers in 1785 as one of the historical events with which the Framers of the Constitution were cognizant and which "did much to bring about the adoption of the [first] amendment." 297 U.S. at 248. This passage may well have signaled to state legislators that use of their discriminatory sales taxes would not be tolerated. At the same time, the *Grosjean* decision did not discourage state legislatures from subjecting newspaper and magazine owners to other forms of taxation such as property and corporate income taxes. The lack of exemptions from these taxes in the states can logically be interpreted as a recognition by the states that those were the forms of taxation to which the *Grosjean* decision was referring when it stated, "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government." 297 U.S. at 250. It warrants emphasis that this passage spoke only of the taxation of *owners*, rather than the taxation of *sales*.

In recent years, economic pressures have forced the states to look to every possible source of revenue and many exemptions to sales tax laws have been eliminated.[36]

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36. In 1965, state sales and use taxes raised a total of $17.1 billion. U.S. Bureau of the Census, "Governmental Finances in 1964-65," GF 65 at 18. By 1980, states had more than tripled their sales and use tax revenue to $53 billion. U.S. Bureau of the Census, "Quarterly Summary of State and Local Tax Revenue," GT 80 No. 4, at 1, Table A (1981).

Even so, exemptions which exist for newspaper and magazine sales have for the most part remained intact. This is yet another indication that the states recognize the constitutional problem with imposing this particular tax on the press.

Several state court decisions tend to confirm that the intention of the state legislatures was both to avoid First Amendment problems and to encourage the free flow of information. For example, in *Sears, Roebuck & Co. v. State Tax Commission,* 370 Mass. 127, 345 N.E.2d 893, 896 (1976), the Massachusetts Supreme Judicial Court struck down a tax on advertising supplements inserted into Massachusetts newspapers. The court wrote, "We are confirmed in our reading of the statute by the obvious intention of the Legislature to free newspapers of a large part of the burden of sales and use taxes. . . . A tax on the advertising revenue of newspapers could have a devastating effect on First Amendment freedoms." *Id.* at 896 (citing *Grosjean v. American Press Co.,* 297 U.S. 233 (1936)).

Whatever the actual reason that most states have exempted sales of various types of information from their sales taxes, there is now a clear tradition in the United States of exempting such sales and it should be viewed as persuasive evidence that imposition of such taxes on the press would violate the First Amendment.[37]

37. This Court previously has looked to a traditional lack of press regulation as persuasive evidence that the First Amendment stands as a bulwark against such regulation. *See Press-Enterprise Co. v. Superior Court,* ..... U.S. ....., 54 U.S.L.W. 4869, 4871 (June 30, 1986); *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980). The lack of a tradition of exemption for the sale of machinery used in printing led the Illinois Supreme Court to uphold a tax on printing presses in *Chicago*

(Continued on following page)

The existence of a tradition of exemption also poses another serious danger to the press. State legislatures and courts could easily use the threat of ending that tradition as a means to control the press. For those publications with inflexible budgets, declining revenues, or marginal profits, the fear that their years of exemption from taxation may be ended may well chill much expression.

D. Arkansas Times Magazine Is Entitled to the Same First Amendment Protection Afforded to Other Members of the Press

The transaction at issue—sale of the Arkansas Times magazine to members of the general public—plainly is entitled to the protection which the First and Fourteenth Amendments afford other arms of the press.

In the *Grosjean* decision itself, the Court addressed the scope of the First Amendment protection it was affording when it stated, "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of information. *The newspapers, magazines and other journals of the country,* it is safe to say, have shed more light on the public and

Footnote continued—

Tribune Co. v. Johnson, 106 Ill.2d 63, 87 Ill. Dec. 505, 477 N.E.2d 486 (1985), *appeal dismissed,* ..... U.S. ....., 54 U.S.L.W. 3270 (1985) (White, Stevens, and O'Connor, JJ., dissenting), notwithstanding that the Illinois Legislature enacted a recent amendment to its sales tax exempting machinery used in other types of manufacturing processes. Exclusion of magazines such as the Arkansas Times from an exemption does not alter the fact that the press generally has been exempted from this tax because exclusion of the Times based on its content is itself constitutionally prohibited. *Police Department of Chicago v. Mosley,* 408 U.S. 92, 96 (1972). And, as shown by *Point I.D., infra,* the Arkansas Times is entitled to the same First Amendment protection as other members of the press.

business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." 297 U.S. at 250 (emphasis added). The Court expressed no words of limitation in this passage, but rather extended First Amendment protection to any means of communicating important information, expressly including magazines.

In a number of recent decisions, this Court has held that the First Amendment "both fully protects and implicitly encourages" all types of "discussion of 'matters of public concern'" irrespective of the medium of transmittal or the identity of the speaker.[38]

The record in this case discloses that the Arkansas Times magazine is a publication which publishes matters of public or general concern as do other protected media. The affidavit of Allen Leveritt, publisher of the Arkansas Times, shows the journal has a monthly circulation of 23,000 subscriptions and 5,000 single copy sales.

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38. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, ... U.S. ....., ..., 106 S.Ct. 903, 908 (1986) (public utility's newsletter the content of which ranged from energy-saving tips to stories about wildlife conservation, and from billing information to recipes) (Powell, J., announcing judgment of the Court in which Burger, C.J., and Brennan and O'Connor, JJ., concurred); *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530 (1980) (same); *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978). *See also City of Los Angeles v. Preferred Communications, Inc.*, ... U.S. ....., 54 U.S.L.W. 4542, 4543 (April 29, 1986) (expressing the view that "'the business of cable television, like that of newspapers *and magazines,*'" "plainly implicate[s] First Amendment interests") (quoting brief of respondents emphasis added); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ... U.S. ....., 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (holding that constitutional protections against libel and slander actions protect all speech regarding matters of public concern).

In her deposition, H. Gail Price, manager of the State Sales and Use Tax Section of the Department of Finance, conceded that the Arkansas Times and the state's major daily newspaper are different only in format and depth of coverage. She testified:

> From a professional standpoint, I don't know how to compare the Arkansas Gazette with the Arkansas Times but personally feel they are different because the Times is more of a magazine. It usually goes into more detail on its article[s] but that is a personal observation, not a professional one. I would not take exception to the statement that they both contain articles concerning sports, religion, political and social events. (T. 196).

Many states which have considered the scope of their sales tax exemptions have construed their statutes broadly to encompass publications which are comparable to the Arkansas Times magazine. For example, the Supreme Court of Illinois ruled that magazines were exempt from sales tax under a statute that provided "the purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) shall not be deemed to be a purchase, use or sale of tangible personal property." *Time, Inc. v. Hulman*, 31 Ill.2d 344, 201 N.E. 2d 374 (1964). Rejecting the arguments that the exemption statute encompassed only newspapers, the Illinois court recognized that newspapers and magazines compete for subscriptions and advertising, and that a contrary construction of the statute would create unconstitutional discrimination in favor of newspapers and against magazines. *Id.* at 352, 201 N.E.2d at 378. The court wrote:

> The power of the legislature to establish classifications which will extend a privilege to one group while denying it to another is well established. It is only that

classification which "unreasonably discriminates" against one group or another that violates the constitutional guaranties. After a full and careful consideration of the classes of newspapers and magazines disseminating news and information, we are of the opinion that there is no real or substantial difference between newspapers and plaintiffs' magazines. The same consideration which induced the legislature to recognize that publishers of newspapers were not within the taxable occupation carries over to publishers of news magazines or other news periodicals. *Id.* at 352-53, 201 N.E.2d at 378.

In one group of cases courts have held that state sales tax exemptions delineated for "newspapers" also extend to advertising supplements and other publications devoted primarily to advertisements.[39] In one case, the Vermont court employed a dictionary definition of "newspaper" to conclude that a weekly publication which consisted almost entirely of advertisements was within the state's "newspaper" exemption. *Hawden*, 139 Vt. at 39, 422 A.2d at 257.

Other types of publications, such as student newspapers, a map listing the addresses and directions to movie stars' homes, a "confidential" business publication, a tax publication, and a publication written for estate planners, all have been held to be well within the definition of exempt periodicals.[40]

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39. *Greenfield Town Cryer, Inc. v. Commissioner of Revenue*, 385 Mass. 692, 433 N.E.2d 898 (1982); *Sears, Roebuck & Co. v. State Tax Commission*, 370 Mass. 127, 345 N.E.2d 893 (1976); *Daily Law Record Co. v. James*, 629 S.W.2d 348 (Mo. 1982) (en banc); *Hawden, Inc. v. Department of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980), *appeal dismissed*, 451 U.S. 977 (1981).

40. *See Campus Communications, Inc. v. Department of Revenue*, 473 So.2d 1290 (Fla. 1985) (construing exemption for sale of "newspapers" to include bulk sale of free distribution

(Continued on following page)

All of these cases recognize that the constitutional values which the exemptions were intended to protect is the free flow of information which is important to the citizens of a self-governing society. The Arkansas Supreme Court, in placing a narrow construction on its exemption for newspapers and magazines is aberational; that state's application of the statute as applied to sales of the Arkansas Times magazine now requires this Court to hold such taxation unconstitutional.[41]

II.

The State of Arkansas Has No Compelling Reasons for Imposing a Tax on the Appellant's Distribution of Information

The State of Minnesota argued in the *Minneapolis Star* case that raising revenue for the state was a com-

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Footnote continued—

student newspapers by printer to publisher and observing "a newspaper is a newspaper is a newspaper"); *Welton v. Los Angeles*, 18 Cal.3d 497, 556 P.2d 1119, 134 Cal.Rptr. 668 (1976); *Business Statistics Organization v. Joseph*, 299 N.Y. 433, 87 N.E.2d 505 (1949); *Research Institute of America, Inc. v. Department of Taxation & Finance*, 99 Misc.2d 243, 415 N.Y.S.2d 928 (1979). In *Welton*, a seller of maps in Hollywood, California, was exempted under the classification of "periodical" from both a city business tax and a state sales tax. The Supreme Court of California wrote that the "commercial character of [the seller's] activities does not deprive her of constitutional protection." 556 P.2d at 1122. The California Court supported its conclusion with three of this Court's decisions: *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Ginzburg v. United States*, 383 U.S. 463 (1966); *Smith v. California*, 361 U.S. 147 (1959). The California court added, "The fact that some may view the map as lacking opinion, newsworthiness or information of social worth. is constitutionally irrelevant. This court may not—consistent with its obligations to the Constitution—examine the map's content or venture an opinion of its social worth." 556 P.2d at 1122.

41. As observed in footnote 24 *supra*, a section of the Gross Receipts Tax exempts those sales which cannot constitutionally be taxed and therefore the statute itself need not be invalidated.

pelling interest which justified its tax in that case, but the Court rejected that argument as unpersuasive because the state had many other means available to raise revenue other than imposing a discriminatory tax against the press. The Court wrote:

> The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax which singles out the press.[42]

This Court also concluded in *Minneapolis Star* that any interest advanced by Minnesota to justify its scheme would be inadequate because the Minnesota tax not only singled out the press from different treatment, but because it "targets a small group of newspapers." 460 U.S. at 592. "Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." *Id.*

The State of Arkansas can offer no stronger reasons than did Minnesota for imposing its tax to sales of the

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42. 460 U.S. at 586. In support of the conclusion that a generally applicable tax could be imposed, the Court cited *United States v. Lee*, 455 U.S. 252 (1982), as standing for a different but analogous proposition. The *Lee* case does not actually support the proposition, however, because there the Court found the United States had an overriding interest in the taxing scheme at issue and for that reason, rather than the general applicability of the tax, this Court upheld the tax.

Arkansas Times and therefore the imposition of the Arkansas tax on such sales would violate the First and Fourteenth Amendments.

CONCLUSION

The decision of the Supreme Court of Arkansas should be reversed and sales of the Arkansas Times magazine should be held to be exempt from the Arkansas Gross Receipts Tax because application of that tax to such sales would abridge the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

DONALD M. MIDDLEBROOKS
Counsel of Record
THOMAS R. JULIN
JASON B. MEYER
STEEL HECTOR & DAVIS
Attorneys for the City & Regional Magazine Association
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing motion for leave to file a brief *amicus curiae* and brief *amicus curiae* of the City & Regional Magazine Association were served upon each of the following, who comprise all of the parties required to be served, by placing said copies in the United States Mail, first class postage pre-paid, in accordance with Rule 28.3 of the Rules of this Court, on or before the 1st day of August, 1986.

Anne Owings Wilson
Counsel of Record for Appellant
House, Wallace, Nelson & Jewell, P.A.
1500 Tower Building
Little Rock, Arkansas 72201

Joseph Svoboda
Counsel of Record for Appellee
Department of Finance and Administration
Post Office Box 1272-L
Little Rock, Arkansas 72203

DONALD M. MIDDLEBROOKS

AUG 1 1986

No. 85-1370 (1)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ARKANSAS WRITERS' PROJECT, INC.,

Appellant,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

MOTION OF THE TIMES MIRROR COMPANY AND NEWSWEEK, INC. FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT

Of Counsel
WILLIAM A. NIESE
JEFFREY S. KLEIN
THE TIMES MIRROR COMPANY
Times Mirror Square
Los Angeles, CA 90053
(213) 972-5000

REX S. HEINKE
Counsel of Record
GIBSON, DUNN & CRUTCHER
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7000

DIANA M. DANIELS
NEWSWEEK, INC.
444 Madison Avenue
New York, NY 10022-6999
(212) 350-4713

Of Counsel
KELLI L. SAGER
GIBSON, DUNN & CRUTCHER

Attorneys for Amici Curiae

34pp

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No. 85-1370

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

ARKANSAS WRITERS' PROJECT, INC.,

Appellant,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

MOTION OF THE TIMES MIRROR COMPANY AND NEWSWEEK, INC. FOR LEAVE TO FILE BRIEF AMICI CURIAE IN SUPPORT OF APPELLANT

The Times Mirror Company and Newsweek, Inc. move for leave to file the attached brief amici curiae in this case. The consent of the attorneys for the appellant

has been obtained. Amici are informed that the attorney for the appellee refuses to consent to the filing of any briefs amici curiae in support of the appellant.

The Times Mirror Company ("Times Mirror") owns and operates the Los Angeles Times, the daily newspaper with the largest circulation in California, the Denver Post in Colorado, the Hartford Courant in Connecticut, Newsday in New York, and other daily newspapers, as well as various magazines, various cable television systems, and four television stations. Times Mirror has a direct interest in the outcome of this action because it is presently a party to a case pending in the Los Angeles Superior Court which raises issues similar to the case at hand, namely, whether differential taxation of different media is unconstitutional. (Times Mirror, et al. v. City of Los Angeles, Los Angeles Superior Court No. C 511941.)

Newsweek, Inc. ("Newsweek") is the publisher of a weekly national news magazine. Newsweek also has a direct interest in the outcome of this litigation because it is presently a party to a case pending in the Davidson County Chancery Court, Tennessee, in which one of the issues is the constitutionality of differential tax treatment of the media. (Newsweek, Inc. v. Celauro, Davidson County Chancery Court No. 86-1250 II.)

In addition, both Times Mirror and Newsweek, have a strong interest in preventing the government from exercising its taxing power in a manner that infringes upon their First Amendment rights. The Arkansas Supreme Court's decision, by permitting unequal tax treatment of different media in that state, provides the government with a weapon which may be used discriminatorily against media entities critical of the government or which may be

used to reward media organizations which publish material of which the government approves. Such discrimination constitutes a real and direct threat to the First Amendment rights of amici curiae. A clear directive from this Court is required to prevent state and local governments from enacting similar laws which discriminate between the media.

Amici curiae's brief will focus on the constitutionality of such disparate tax treatment of different media. Amici are informed that neither the appellant's brief, nor those of other amici, will deal directly with this critical issue. Amici understand that appellant's brief will focus on Arkansas' discrimination between different magazines based on their contents, as well as on Arkansas' discrimination between different members of the same media, namely, magazines. Amici's brief focuses on Arkansas' discrimination between different

media, e.g., newspapers, who are exempt from Arkansas' tax, and other media, e.g., book publishers and the electronic media, that are not exempt from Arkansas' tax.

Therefore, The Times Mirror Company and Newsweek, Inc. respectfully request this Court to grant their motion for leave to file a brief amici curiae in this matter.

DATED: August 1, 1986.

Respectfully submitted,

REX S. HEINKE
Counsel Of Record

Attorneys for Amici Curiae

Of Counsel:
WILLIAM A. NIESE
JEFFREY S. KLEIN
DIANA M. DANIELS
KELLI L. SAGER

No. 85-1370

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OCTOBER TERM, 1986

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CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF AMICI CURIAE OF THE TIMES MIRROR COMPANY AND NEWSWEEK, INC. IN SUPPORT OF APPELLANT

INTERESTS OF AMICI CURIAE

Amici curiae are media organizations with a direct interest in the outcome of this litigation, as fully set forth in their

motion for leave to file a brief amici curiae, supra.

SUMMARY OF ARGUMENT

The Arkansas law in question exempts all newspapers and all publishers of "religious, professional, trade and sports journals" from its state sales tax.

This Court has twice held that tax laws which discriminate between the same type of media, in both cases between large and small newspapers, are impermissible under the First Amendment to the United States Constitution, because the government cannot adopt tax laws that may censor its critics or that may reward its supporters. Grosjean v. American Press Co., 297 U.S. 233 (1936) and Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S 575 (1983). Tax laws which discriminate between different types of media are also impermissible for the same reason:

permitting the government to differentially tax different types of media would allow political favoritism and the imposition of special burdens on disfavored media. To guard against this government censorship, differential taxation of the media, whether based upon the size or the type of media, cannot be permitted absent a compelling state justification. The government simply has no right to enhance the voices of some members of the media by not taxing them, absent a compelling state interest. Buckley v. Valeo, 424 U.S. 1 (1976) and First National Bank of Boston v. Bellotti, 435 U.S. 765 (1978).

No justification has been or can be offered for the differential treatment of newspaper and certain magazine publishers under Arkansas' tax law. The only interest which might be assumed, the interest of the state in raising revenue, has already been determined by this Court to be completely

inadequate to justify such discrimination. Minneapolis Star, supra. The Arkansas tax law must therefore be invalidated as a violation of the First Amendment.

3.

ARGUMENT

The Arkansas tax law exempts newspapers and publishers of "religious, professional, trade and sports journals" from its state sales tax. Ark. Stat. Ann. §§ 84-1904(f) and (j). Thus, all newspapers and some magazines are exempt from Arkansas sales tax, while all other media are subject to it.

A. DISCRIMINATION BETWEEN DIFFERENT MEDIA ACTIVITIES IS IMPERMISSIBLE UNDER THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

There are two decisions of this Court which have dealt directly with discriminatory taxation of the media. In Grosjean v. American Press Co., 297 U.S. 233 (1936), this Court invalidated a license tax

imposed by the State of Louisiana on the gross receipts from the sale of advertising by all newspapers with a weekly circulation above 20,000 copies. This Court unanimously found that the license tax, which differentiated between large and small newspapers, was unconstitutional under the First Amendment./1/

In 1983, this Court again reviewed the constitutionality of a tax law which provided for differential tax treatment of large and small newspapers. Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983). By a 7-2 vote, this Court held that where such disparate treatment of the press was without

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1/ Imposition of this tax was apparently motivated by Senator Huey Long's desire to punish newspapers which had published unflattering statements about him. This Court noted that "hostile purpose" in striking down the offending tax. 297 U.S. at 250. However, this Court has made it clear that an improper purpose is not a requirement for a finding of unconstitutionality, infra.

a compelling justification, the tax law must be found unconstitutional under the First Amendment to the United States Constitution. The rationale applied by this Court in Minneapolis Star is fully applicable here.

Minneapolis Star involved a Minnesota state tax on the cost of paper and ink products consumed in the production of a publication. Prior to 1971, the Minneapolis Star & Tribune Co., a newspaper publisher, was exempt from Minnesota's sales and use tax provisions. In 1971, however, the Minnesota Legislature eliminated the exemption for newspapers from the use tax, and adopted provisions taxing ink and paper used in publications. This tax was later amended to exempt the first $100,000 worth of ink and paper consumed. As a result of that exemption, "only a handful of publishers" paid any tax at all, and even

fewer paid "any significant amount of tax." 460 U.S. at 591.

In contrast to Grosjean, there was no evidence that the Minnesota Legislature adopted this special use tax for any impermissible motive or to censor the media. 460 U.S. at 580. As this Court noted, however: "[i]llicit legislative intent is not the sine qua non of a violation of the First Amendment." This Court added that "[w]e need not and do not impugn the motives of the Minnesota Legislature in passing the ink and paper tax." 460 U.S. at 592. Thus, evidence of an improper motive is not a sine qua non for a finding that Arkansas' tax is unconstitutional.

This Court, of course, recognized that "[i]t is beyond dispute that the State and the Federal government can subject newspapers to generally applicable economic regulations without creating constitutional

problems." 460 U.S. at 575. Nonetheless, this Court found that the Minnesota tax law did not fit within this general principle:

> Minnesota, however, has not chosen to apply its general sales and use taxes to newspapers. Instead, it has created a special tax that applies only to certain publications protected by the First Amendment. . . . A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest.

460 U.S. at 581-82 (emphasis added).

The Arkansas Supreme Court relied on the rule that the press is not exempt from general taxes in upholding Arkansas' differential state tax. Ragland v. Arkansas Writers Project, 287 Ark. 155, 698 S.W.2d 802, 803 (1985). This completely misses the point made in the above-cited passage of

Minneapolis Star. Where only "certain publications" are subject to a tax or other economic regulation, the tax or regulation is no longer a "generally applicable economic regulation," so the tax or regulation violates the First Amendment unless a compelling state interest can be shown for the differentiation./2/ This is precisely the situation in Arkansas, where newspapers and some magazines are exempt from the tax, but other magazines and other media are not.

In Minneapolis Star, this Court explained in great detail the dangers which can arise from differential treatment of the press, particularly where a powerful

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2/ In section 3(C), infra, we demonstrated that Arkansas has offered no justification, compelling or otherwise, for its differential treatment of various media.

government tool such as the taxing power is utilized:/3/

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if

---

3/ This Court has repeatedly recognized the potentially devastating effects which can accompany use of the taxing power, beginning with the oft-quoted phrase from McCulloch v. Maryland, 4 Wheat 316, 431 (1819): "the power to tax involves the power to destroy." See also Massachusetts v. United States, 435 U.S. 444, 455-56 (1977) ("a tax is a powerful regulatory device; a legislature can discourage or eliminate a particular activity that is within its regulatory jurisdiction simply by imposing a heavy tax on its exercise"); Speiser v. Randall, 357 U.S. 513, 518 (1957) ("[i]t is settled that speech can be effectively limited by the exercise of the taxing power").

> it must impose the same burden on the rest of its constituency. When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. . . .
>
> Further, differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to the suppression of expression, and

such a goal is presumptively unconstitutional.

Differential taxation of the press, then, places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

460 U.S. at 585 (footnote and citations omitted; emphasis added). This Court therefore invalidated Minnesota's special use tax on the grounds that its structure alone violated the First Amendment rights of the newspaper. 460 U.S. at 591-92.

Although Minneapolis Star dealt with differential tax treatment of newspapers based upon their size, its rationale applies to Arkansas' differential treatment of

certain magazines based upon the subject matter of the magazine and newspapers, by exempting all of these media from its state sales tax. Permitting such differential taxation allows the government to "reward" or "punish" a particular type of media based upon whether that type of media portrayed the government favorably or unfavorably. By thus "singling out" certain elements of the press, the Arkansas tax statute permits the government to "destroy a selected group . . . by burdensome taxation." See also Grosjean, 297 U.S. at 250-51.

Furthermore, the "political constraints that prevent a legislature from passing crippling taxes" are absent where a tax is applied only to the media or only to certain elements of the media, e.g., a type of media, like newspapers, or members of one type of media, like some magazines. Uniform taxes provide "political constraints" because the taxes fall on all taxpayers, who

will protest unfairly burdensome taxes. Where only the media, or particularly where only some elements of the media, are taxed, there will be no general outcry and the government can act with virtual impunity.

The principle that differential treatment of different media is unconstitutional has a long history. This doctrine was articulated by this Court over three decades ago in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1951). In Burstyn, a state law forbid the commercial showing of any motion picture without a license, and a license could be denied for showing "sacreligious" films. The government defendants argued that even though prior restraints against newspapers were clearly unconstitutional, such restraints were permissible against motion pictures. This Court easily rejected that argument:

> Each method [of expression] tends to present its own peculiar

> problems. But the basic principles of freedom of speech and of the press, like the First Amendment's command, do not vary. Those principles, as they have frequently been enunciated by this Court, make freedom of expression the rule. There is no justification in this case for making an exception to that rule.

343 U.S. at 503 (emphasis added)./4/

Lower federal and state courts have consistently applied this doctrine to strike down regulations which were applied

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4/ Of course, "[e]ach method [of expression] tends to present its own peculiar problems," e.g., different problems arise in regulating loudspeaker trucks or billboards than arise with respect to the electronic media. These distinctions arise from inherent differences in the technology involved and will justify some differential treatment of different media. However, no such differences are even asserted, nor could they be, to justify Arkansas' differential taxation of different media.

differentially to different media. See, e.g., Community-Service Broadcasting of Mid-America, Inc. v. Federal Communications Commission, 593 F.2d 1102, 1123 (D.C. Cir. 1978) (striking down FCC regulations which required certain administrative actions to be taken by noncommercial, but not commercial, broadcasters); Greater Fremont, Inc. v. City of Fremont, 302 F. Supp. 652, 663 (N.D. Ohio 1968), aff'd sub nom. Wonderland Ventures, Inc. v. Sandusky, 423 F.2d 548 (6th Cir. 1970) (invalidating municipal ordinances which applied different regulations to a community antenna television system than those applied to other broadcasters); City of Alameda v. Premier Communications Network, Inc., 156 Cal. App. 3d 148, 202 Cal. Rptr. 684, cert. denied, ___U.S. ____, 105 S. Ct. 567, 83 L. Ed. 2d 508 (1984) (invalidating municipal tax ordinance which placed a higher tax

burden on subscription television services than was placed on other businesses).

This reasoning is clearly applicable here. The "basic principles of freedom of speech and of the press" apply equally to magazines, newspapers, and all other media, e.g., television stations, books, and radio stations. Differential taxation of different types of media therefore is unconstitutional absent a compelling state justification.

B. THE FIRST AMENDMENT DOES NOT PERMIT THE GOVERNMENT TO ENHANCE THE SPEECH OF SOME AT THE EXPENSE OF OTHERS.

By exempting newspapers and certain magazines from its tax, while imposing its tax on all other types of magazines and all other media, the Arkansas tax law also subsidizes some members of the press at the expense of the others. Such disparate treatment is unconstitutional.

This Court has held that the government may not enhance the speech of some elements of society at the expense of others. In Buckley v. Valeo, 424 U.S. 1 (1976), this Court applied that principle in striking down provisions of the Federal Election Campaign Act which restricted the ability of certain groups and individuals to influence elections by their contributions. This Court stated:

> [T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed "to secure 'the widest possible dissemination of information from diverse and antagonistic sources,'" and "'to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"

Id. at 49 (emphasis added; citations omitted). This holding was explicitly reaffirmed two years later in First National Bank of Boston v. Bellotti, 435 U.S. 765, 790-91 (1978), where this Court struck down a statute which prohibited political contributions to referendum measures by businesses or corporations./5/

Similar considerations apply here. By providing exemptions to magazines which deal with certain subject matters and to newspapers, the Arkansas tax law is "enhancing the voice" of those publications at the "expense" of the remaining magazines and other media, e.g., book publishers, which must bear a tax burden not imposed on the exempted publications.

5/ This issue was raised in Minneapolis Star, but was not reached by this Court. 460 U.S. at 593 n.17.

Moreover, even where a tax on the media or some members of the media is asserted to be "favorable" in comparison to that imposed on other businesses, a differential tax cannot be permitted. This Court has acknowledged that the judiciary is not well equipped to evaluate the true economic impact of differential tax laws, and is therefore unable to effectively compare relative "burdens" produced by differential taxes:

> [C]ourts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation. The complexities of factual economic proof always present a certain potential for error, and courts have little familiarity with the process of evaluating the relative economic burden of taxes. In sum, the possibility of error inherent

> in the proposed rule [permitting favorable differential tax of the media] poses too great a threat to concerns at the heart of the First Amendment, and we cannot tolerate that possibility

460 U.S. at 589-90. Thus, where a differential tax on one media organization "enhances" the position of another, or even where the tax on the media is supposedly less than that on other businesses, differential taxes cannot be permitted absent a compelling governmental interest.

C. <u>ARKANSAS CANNOT DEMONSTRATE A STATE INTEREST, COMPELLING OR OTHERWISE, THAT JUSTIFIES ITS DIFFERENTIAL TAXATION OF THE MEDIA.</u>

As the preceding section sets forth, differential treatment of the press is presumptively unconstitutional. This Court has held that a heavy burden must be

met by the state in order to overcome this presumption:

> Differential taxation of the press, then, places such a burden on the interests protected by the First Amendmdent that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation.

460 U.S. at 585 (emphasis added).

This requirement is consistent with this Court's earlier rulings that regulations which burden the exercise of First Amendment rights must always be strictly scrutinized. See, e.g., Citizens Against Rent Control v. Berkeley, 454 U.S. 290, 294 (1981) ("regulation of First Amendment rights is always subject to exacting judicial review"). Under this level of judicial

scrutiny, the traditional presumption of constitutionality is eliminated, and the government must prove that the classification in question is necessary and precisely tailored to achieve a compelling government interest. Globe Newspapers Co. v. Superior Court, 457 U.S. 595, 607 (1982). As this Court recently stated in Philadelphia Newspapers, Inc. v. Hepps, __ U.S. ___, 106 S. Ct. 1558, 89 L. Ed. 2d 783 (1986):

> In the context of governmental restriction of speech, it has long been established that the government cannot limit speech protected by the First Amendment without bearing the burden of showing that its restriction is justified. . . .

106 S. Ct. at 1564 (citations omitted).

It is important to note that amici are not arguing that exemptions in specific tax

provisions are never permissible, even where a particular exemption may favor one media organization over another./6/ This Court's holding in Minneapolis Star and the above-cited authorities make it clear,

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6/ This Court's summary affirmances of two state court opinions in this area indicate that where an adequate justification is shown for a particular exemption, the exemption is permissible. See Matter of the Assessment of Additional North Carolina and Orange County Use Taxes Against Village Publishing Co., 312 N.C. 211, 322 S.E.2d 155 (1984), appeal dismissed for want of a substantial federal question, ____U.S.____, 105 S. Ct. 2693, 86 L. Ed. 2d 710 (1985); Chicago Tribune Co. v. Johnson, 106 Ill. 2d 63, 477 N.E.2d 482, appeal dismissed for want of a substantial federal question, ___ U.S.____, 106 S. Ct. 241, 88 L. Ed. 2d 250 (1985). Similarly, this Court noted in Minneapolis Star that its earlier opinions had permitted application of general laws to the media, even where exemptions were present, if those exemptions were justified by a sufficient government interest. 460 U.S. at 583 (citing Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Mabee v. White Plains Publishing Co., 327 U.S. 178 (1946); Associated Press v. NLRB, 326 U.S. 1 (1945)). These cases are inapposite here, however, where no justification at all for the exemption applied to some members of the media has been offered, let alone demonstrated.

however, that such exemptions are permissible only if there is a compelling state interest in disparate treatment of the media. See, e.g., 460 U.S. at 585.

Any contrary position would require this Court to effectively overrule its decision in Minneapolis Star. One of the primary bases for that decision was the government censorship and repression which would inevitably result from granting the government unlimited power to differentially tax different media organizations. 460 U.S. at 585. Requiring the government to provide a compelling justification for any exemptions or differentiation protects against this result, by guaranteeing that taxation cannot simply be imposed as a "punishment" for critical reviews of the government or removed as a "reward" for self-censorship by media organizations.

Despite this undeniable requirement, Arkansas has presented no justification

whatsoever, let alone a compelling one, for its exemption of newspapers under its tax law or for its differentiation between different magazine publishers. The only possible justification which may be offered is the raising of revenue, and this Court has already rejected that as an adequate justification for differential taxation:

> The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: a state could raise the revenue by taxing businesses generally, avoiding the

> censorial threat implicit in a tax that singles out the press.

460 U.S. at 586 (footnote omitted).

This Court has held that a compelling justification is required to overcome the constitutional presumption against differential taxation of the media. Arkansas has failed to provide any justification at all for its differential tax law. Therefore, the Arkansas tax law must be invalidated.

CONCLUSION

In Minneapolis Star, this Court struck down differential tax treatment of First Amendment activities. This Court reasoned that, if differential taxation were permitted, the government could use its taxing power to punish some First Amendment activities while rewarding others. Similarly, in Buckley and Bellotti, this Court held that the government may not

restrict the speech of some elements of our society to enhance the relative voice of others. These concerns are equally applicable here.

Permitting the government to selectively favor newspapers and certain magazine publishers by exempting them from state taxes, while assessing a tax on other magazines and other media, "gives the government a powerful weapon against the taxpayer selected," which would permit it to "destroy" particular magazines and other media "by burdensome taxation." This differential treatment cannot be permitted to continue, absent a compelling justification. No justification whatsoever has been presented in this case.

Amici therefore respectfully request this Court to reverse the opinion of the Arkansas Supreme Court and hold that differential taxation of different types of media is impermissible under the First

Amendment absent a showing of a compelling state interest.

DATED: August 1, 1986.

Respectfully submitted,

REX S. HEINKE
Counsel Of Record

Attorneys for Amici Curiae

Of Counsel:
WILLIAM A. NIESE
JEFFREY S. KLEIN
DIANA M. DANIELS
KELLI L. SAGER

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In the Supreme Court of the United States

October Term, 1985

ARKANSAS WRITER'S PROJECT, INC., *Appellant*

V.

CHARLES D. RAGLAND, Commissioner of Revenue of the State of Arkansas, *Appellee*

On Appeal From the Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ARKANSAS CIVIL LIBERTIES UNION

JACK NOVIK
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

Counsel for Amici

PHILIP E. KAPLAN
KAREN L. ARNDT
KAPLAN, BREWER & MILLER, P.A.
415 Main Street
Little Rock, Arkansas 72201
(501) 372-0400

Counsel of Record

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MOTION FOR LEAVE TO FILE AMICI CURIAE BRIEF

1. Pursuant to Supreme Court Rule 36.2, permission to file the Brief Amici Curiae was sought from the parties; the appellant consented; the appellee refused.

2. The American Civil Liberties Union Foundation ("ACLU Foundation") is a national non-profit organization dedicated to the preservation of the rights and liberties embodied in the United States Constitution, and particularly, in the Bill of Rights. The Arkansas Civil Liberties Union is an affiliate of the ACLU. Through litigation as well as public education, the ACLU Foundation and its affiliates seek to protect all of the fundamental constitutional rights protecting individual liberty, including the rights to free expression (particularly the freedom to dissent).

3. The interest of the ACLU Foundation in this case is based on its concern that the First Amendment rights of the appellant be protected from discriminatory state tax exemption statutes. Moreover, the exemption statutes at issue here raise the potential for further serious violations of the freedom of speech and freedom of press clauses of the First Amendment which will have significant ramifications for the First Amendment freedoms of all citizens.

Respectfully submitted,

KAPLAN, BREWER & MILLER, P.A.
415 Main Street
Little Rock, Arkansas 72201
(501) 372-0400

BY: Philip E. Kaplan
PHILIP E. KAPLAN

COUNSEL OF RECORD

INTEREST OF AMICI

The interest of the amici is fully set forth in the motion for leave to file Brief Amici Curiae.

STATEMENT OF THE CASE

The appellant, Arkansas Writer's Project, Inc., is an Arkansas corporation and publisher of Arkansas Times, a general interest monthly magazine with a circulation of approximately 25,000. Arkansas Times publishes many articles of the kind which frequently appear in newspapers, as well as in the religious, sports, professional, and trade journals published and circulated in Arkansas. It competes with such publications for sales of advertising. Distribution methods used by Arkansas Times, through subscription and over-the-counter sales, are identical with the

distribution methods of other publications, and the method of production of the Arkansas Times is nearly identical to the method of production of all other publications in Arkansas.[1]

The issues which are now ripe for review first materialized in January, 1984, when appellant, in accordance with proper administrative procedure, brought a claim for refund of sales taxes paid to the State of Arkansas pursuant to a tax audit. Appellant then argued both that the "magazine exemption" set forth in Section 84-1904(j) exempted Arkansas Times from sales tax and that if Arkansas Times was not exempt then taxation of

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[1]The stipulated facts established that Arkansas Times is printed and published within Arkansas, and that about eighty percent (80%) of the monthly sales are to regular subscribers. The remaining twenty percent (20%) of its sales are divided between vending boxes similar to those used by newspapers, and sales to retailers for their over-the-counter sale. Opinion of Chancellor Bruce T. Bullion, March 29, 1985.

Arkansas Times, while the sales of newspapers and other magazines were exempted, violated appellant's First Amendment rights.[2]

Appellee, acting within his jurisdiction, denied the claim for a tax refund and an appeal from that determination was taken with the Pulaski County Chancery Court. The Chancellor's resolution of the matter dealt with the literal interpretation of the "magazine exemption," but never addressed the constitutional issues. The Chancellor held that the "magazine exemption" applied to appellant, and this result was appealed to the Arkansas Supreme Court.

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[2]The litigation had begun in 1980 when the Arkansas Commissioner of Revenue, appellee herein, performed a sales tax audit on appellant. The assessment was contested through the administrative process, including an appeal to the Chancery Court of Pulaski County, Arkansas. The case was settled in September, 1982, and appellant agreed to pay sales tax. The issue was revived after this Court's decision in Minneapolis Star & Tribune Company v. Minnesota Commissioner of Revenue, 460 U.S. 575 (1983), when the State again imposed a tax on the appellant.

On October 14, 1985, the Arkansas Supreme Court held that the Chancery Court erred in its construction of the statute, and that the "magazine exemption" did not exempt sales of Arkansas Times, but applied only to religious, sports, professional, and trade journals published in Arkansas. Ragland v. Arkansas Writers Project, Inc., 287 Ark. 155, 697 S.W.2d 94 (1985). (Ragland I)

Although appellant repeatedly argued that the denial of the exemption infringed its First Amendment rights, the Arkansas Supreme Court did not address that argument until November 18, 1985, when it issued its supplementary opinion pursuant to a petition for rehearing. The Court then held that, as applied, the exemption statutes were constitutional under the First Amendment, and that the Arkansas Gross Receipts Tax was distinguishable from the taxes reviewed by this Court in Minneapolis Star, supra, and

Grosjean v. American Press Company, 297 U.S. 233 (1936), because the Arkansas tax was an "ordinary form of taxation" a general revenue-raising device, from which publications were not necessarily immune.

SUMMARY OF ARGUMENT

The appellant magazine, the Arkansas Times, a monthly general interest publication, is taxed pursuant to the Arkansas Gross Receipts Tax, even though that law exempts all newspapers as well as religious, sports, professional, and trade publications published in Arkansas.

Any tax imposed on the press creates some burden on First Amendment freedom. However, a tax that is non-unfiscatory and that is applied even-handedly may be constitutionally imposed, even on the press. In the instant case, since the tax is clearly

a differential, as opposed to a generally-applied tax, the tax exemption classification scheme comes to the Court with a presumption of constitutional infirmity and the state must advance a compelling interest sufficient to justify its application.

The State of Arkansas has not asserted any compelling basis for the classifications and the statutes are not narrowly written in order to avoid burdening the First Amendment. The Arkansas Supreme Court erred in upholding the statutes, which are clearly unconstitutional.

ARGUMENT

The issue in this case is whether the Arkansas Gross Receipts Tax which impose a tax on appellant, while exempting newspapers and religious, sports, professional, and business journals from taxation, violates the freedom of speech and freedom of the press clauses of the First Amendment to the United States Constitution.

The classification system of sales tax exemptions in Arkansas codified in §§84-1904(f) and 84-1904(j) is repugnant to the fundamental freedoms protected by the First Amendment, because appellee cannot demonstrate any "interest of compelling importance that it cannot achieve without differential taxation to justify such a discriminatory taxing scheme." Minneapolis Star & Tribune Company v. Minnesota Comm. of Revenue, 460 U.S. 575 (1983); United States v.

Lee, 455 U.S. 252 (1982); United States v. O'Brien, 391 U.S. 367 (1968); NAACP v. Alabama, 357 U.S. 449 (1958). The only colorable effort by appellee to advance a state interest significant enough to justify this constitutional infringement is its reference to the alleged "reasonable distinctions" between religious, professional, trade, and sports publications and Arkansas Times.[3] However, such distinctions are illusory.

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[3]Appellee's "rational basis" discussion, as set forth in its brief to the Arkansas Supreme Court, argues that publications devoted exclusively to religion, or to a profession, is of interest to a smaller segment of the population than Arkansas Times, and this fact "conceivably" could have influenced the state legislators when they drafted the exemptions. Notwithstanding the fact that First Amendment infringement mandates a "compelling interest" analysis, appellee's attempts to "fill in" the legislative history of these statutues are self-serving at best.

I. THE "NEWSPAPER" AND "MAGAZINE" EXEMPTIONS TO THE ARKANSAS GROSS RECEIPTS TAX VIOLATE THE FIRST AMENDMENT.

A. The tax exemption classification system as applied to Arkansas Times severely burdens the First Amendment.

The First Amendment does not prohibit all regulation of the press, and it is clear that the states may require publications such as newspapers and magazines to comply with generally applicable economic regulations without abridging constitutional rights. Branzburg v. Hayes, 408 U.S. 665 (1972); Citizens Publishing Co. v. United States, 394 U.S. 131 (1969). In other words, non-discriminatory taxes on the receipts or

income of newspapers are permissible, and this court has consistently recognized this fact in dictum in cases where it found First Amendment violations. Grosjean, supra; Follett v. McCormick, 321 U.S. 573, 578 (1944) (dictum); Murdock v. Pennsylvania, 319 U.S. 105, 112 (1943) (dictum).

Notwithstanding the fact that any form of taxation imposes some burden on the press, all of the cases in which this court has upheld economic regulation of the press have as their common denominator the non-exclusive application of the regulations involved. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946); Associated Press v. NLRB, 301 U.S. 103 (1937). In Follett, supra, this court found a constitutional violation where the state had imposed a flat tax, basically unrelated to the receipts or income of the taxpayer or even to the expenses of administering a valid regulatory scheme,

and established it as a condition precedent to the right to speak. This Court stated, in Minneapolis Star, supra, that by imposing a tax as a condition on engaging in protected activity under the First Amendment, the state creates a prior restraint on protected speech, which bears a very heavy presumption of constitutional infirmity. 460 U.S. at 587, n.9. See, Murdock, supra.

There is no cause for concern when a taxing mechanism is evenly, generally applied. Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949). A discriminatory tax, however, gives government a "powerful weapon" against the taxpayer selected. Minneapolis Star, supra.

The Arkansas Supreme Court must be reversed, because it failed to impose the proper burden on the State. This reasoning is

manifest in the following passage from the Opinion:[4]

> "The legislature has levied a valid sales tax that is applicable to the Times. It is immaterial that an exemption in favor of some other taxpayer may be invalid, as discriminatory. If so, it is the exemption that would fall, not the tax against the Times. The courts cannot create a tax exemption; that must be done by the legislature. It has not exempted the Times."

Ragland v. Arkansas Writers' Project, Inc., 287 Ark. 155, 698 S.W.2d 802,. 803 (1985) (Ragland II).

The very same flawed analysis was addressed by this Court in Minneapolis Star, supra, in reply to an argument by the Minnesota Commissioner of Revenue. The Commissioner had argued that under Oklahoma

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[4]The Arkansas Supreme Court couched its analysis in a "two-fold" context, that is addressing separately the appellant's arguments based on the equal protection clause of the Fourteenth Amendment, and the freedom of speech and freedom of press clauses of the First Amendment. The excerpted analysis addresses the equal protection argument.

Press Publishing Co., supra, the press could not successfully challenge regulations on the basis of the application of the exemption to other enterprises. This Court stated:

> "We disagree. The exempt enterprises in Oklahoma Press were isolated exemptions and not the rule. Here, everything is exempt from the use tax on ink and paper, except the press." (Emphasis added).

460 U.S. at 582, n.5.

Analogizing the Minnesota tax exemption structure to the tax exemptions structure in the instant case, the magazine and newspaper exemptions apply to the majority of publications in Arkansas, while the tax burden under Ark. Stat. Ann. §84-1903, et. seq., falls on the shoulders of a select few publications, including appellant. Arkansas Times is the only Arkansas publication sold through regular subscriptions which is subject to this tax. Such treatment cannot possibly survive a constitutional analysis unless the state can assert a counter-balancing interest

of compelling importance which it could not accomplish without the differential taxation. Minneapolis Star, 460 U.S. at 585; United States v. Lee, supra; United States v. O'Brien, supra; NAACP v. Alabama, supra.

B. Appellee cannot assert a counterbalancing interest of compelling importance to justify the differential tax exemption scheme.

1. The State of Arkansas has no compelling interest in the "newspaper exemption" contained in Section 84-1904(f) or in the "magazine exemption" contained in Section 84-1904(j).

While the taxing power of the State of Arkansas is considerable, the State must meet a heavy burden when it imposes differential taxes or exemption schemes which single out certain groups, publishers, or segments of

the press for special treatment. See, Alaska v. Arctic Maid, 366 U.S. 199, 205 (1961). A bare assertion that the taxing scheme is necessary as a revenue-raising mechanism is not a compelling interest and is an affront to the First Amendment. Under general First Amendment principles, the appellee must come forward with a compelling interest.

On its face, the classification scheme suggests no logical or rational, let alone, compelling basis for its existence.[5]

Furthermore, although it has had ample opportunity, appellee has failed to assert a compelling state interest, or any

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[5]In a Reply Brief in response to the appellee's brief in support of its Motion for Summary Judgment to the Pulaski County Chancery Court, filed August 30, 1984, appellee states that one of the "reasons" for including journals devoted to religion, a profession or trade, and sports in the "magazine exemption" is that the publishers of those journals would "in most cases" be publishing them as a service to their readers rather than as a means of generating income.

basis, for the classification scheme. Appellee has "suggested" that a legitimate basis for the "newspaper" exemption would be the fact that a newspaper reports current events to the general public as a whole, and is normally printed and published on a daily basis,[6] but this argument carries absolutely no weight in a First Amendment analysis. Even when faced at the trial court level in this case with the appellant's argument that there was "no rational distinction between a 'newspaper' and the Arkansas Times,"[7] the appellee failed to address this issue.

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[6]The difference between newspapers and other publications is codified in Regulation No. GR-48(A) of the Gross Receipts Tax Regulations, defining "newspaper", in pertinent part, as "a publication in sheet form containing reports of current events, articles of general interest to the public, published regularly in short intervals..."

[7]Appellant made this argument below, citing Ragland v. K-Mart Corp., 274 Ark. 297, 524 S.W.2d 430 (1981).

C. The tax exemption classification is not narrowly drawn to achieve the State's interest, nor is it written in a way which would avoid burdening fundamental First Amendment rights.

Appellee's tax exemption classification scheme is not necessary to achieve its revenue-raising goals, and nothing would prevent the Arkansas General Assembly, from developing a taxing scheme which does not burden the First Amendment.

In Speiser v. Randall, 357 U.S. 513 (1958), this court stated that, "it cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech." 357 U.S. at 518. Discriminatory taxation of the press raises a heavy presumption of unconstitutionality and any differential treatment of the press

carries with it the threat of "the possibility of subsequent differentially more burdensome treatment." Minneapolis Star, 460 at 488; NAACP v. Button, 371 U.S. 415 (1963). Thus, unless the tax classification system is evenly applied, it infringes on appellant's First Amendment rights.

In Broadrick v. Oklahoma, 413 U.S. 601 (1973), and more recently, in Brown v. Hartlage, 456 U.S. 45 (1982), this Court held that any statutory limitations on the exercise of First Amendment rights of the press must be narrowly drawn. In Buckley v. Valeo, 424 U.S. 1 (1976), this court held that federal restrictions on expenditures by political candidates threatened the most fundamental First Amendment rights and held that those restrictions could be justified only by the government's interests in limiting corruption in campaign fund-raising and in equalizing candidates' economic resources. See, in Mabee

v. White Plains Publishing Co., 327 U.S. 178 (1946), where this Court upheld the differential exemption from the Fair Labor Standards Act of small, weekly, and semi-weekly newspapers, and where the compelling interest was to put those papers on economic parity with other small town enterprises.

No compelling economic, social, or political interest is served by the exemptions codified in §84-1904(f) and §84-1904(j). Despite appellee's winsome speculation on the reasons for the scheme, appellee has utterly failed to present a colorable argument to counter the infringement on appellant's rights. Minneapolis Star, 460 U.S. at 597.

When drafting the First Amendment, the Framers intended to extend explicit constitutional protection to the institution of the press in this society and were concerned with preserving the autonomy of the

press and preventing the evolution of a communications media which merely transmitted governmental policy or "current notions of social justice." Stewart, "Or of the Press," 26 Hastings LJ 631, 636 (1975), 460 U.S. at 583, n.6.

In Minneapolis Star, supra, Justice O'Connor discussed the analysis which the Framers of the First Amendment would have given to a classification scheme where the press was subjected to a differential tax, stating, in pertinent part:

> "There is substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment. The role of the press in mobilizing sentiment in favor of independence was critical to the Revolution. When the Constitution was proposed without an explicit guarantee of freedom of the press, the antifederalists objected."

Thus, the tax exemption scheme in the instant case is an unconstitutional

infringement of the speech and press clauses of the First Amendment.

D. No evidence of impermissible motives or intent to infringe constitutional rights is necessary to prove a violation of the First Amendment.

In rejecting the appellant's argument that the statutory "magazine" and "newspaper" exemptions amounted to an infringement of the First Amendment, the Arkansas Supreme Court distinguished the instant case from Grosjean, supra. In Grosjean, the State of Louisiana had imposed a license tax on all gross receipts from the sale of advertising on those newspapers with a weekly circulation above 20,000. Of the more than 124 publishers in Louisiana, only 13 were subject to the tax. This Court found that

because the tax was tied irreparably to circulation and was intended to "curtail[ed] the flow of information," and because it impacted on a few publishers who would bear the taxation burden, it was an abridgement of the freedom of the press clause of the First Amendment. Id. at 250-251.[8]

However, although there is no evidence in this instant case of legislative intent to penalize the appellant, Grosjean and Speiser, nonetheless, reflect the importance of First Amendment values in assessing a tax statute. Those cases provide a framework for the determination of this case which involved

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[8]The Court characterized the tax in Grosjean as a "deliberate and calculated device in the guise of a tax to limit the circulation of information." 297 U.S. at 250. See, Pittsburgh Press Co. v. Pittsburgh Comm. on Human Relations, 413 U.S. 376 (1973).

a statute with a discriminatory effect, and no discernible purpose.[9]

Thus, the absence of a Grosjean-type legislative intent is certainly not fatal to appellant's case as this Court recognized in Minneapolis Star, supra, an illicit legislative intent is not the sine qua non of a violation of the First Amendment, and that even regulations aimed at "proper" governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.

Appellee has claimed that in determining the constitutionality of the exemptions and the statute as a whole, a court should attach some special significance to the

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[9]In Speiser, the Court held that a provision of the California constitution which conditioned the allowance of a property tax exemption to American veterans on their annually filing an oath of loyalty was a violation of the First Amendment right of veterans to freedom of speech without the procedural safeguards exacted by the due process clause of the Fourteenth Amendment.

fact that the Gross Receipts Tax is a general tax for revenue purposes, imposed on the sale of items and, thus, paid by the purchasers of the items. Appellee also argues that the fact that the tax exemption classification in Arkansas is not overtly "hostile" to the press cures any possible constitutional informity and goes on to cite Section 17 of the Gross Receipts Tax Act of 1941, which sets forth the original purpose of the Act as providing economic support for the schools, free textbooks, charitable institutions, and other equally worthy causes.[10] All of this rhetoric is empty, however, in view of this Court's holding in Minneapolis Star. The issue here is not whether there is a good reason for a tax, but whether there is a compelling reason for

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[10] Ark. Stat. Ann. §84-1903 provides, in pertinent part, "there is hereby levied an excise tax of three percentum (3%) upon the gross proceeds or gross receipts derived from all sales to any person...(a) tangible property..."

the discriminatory application of that tax to the appellant.

The "charitable" purposes of the original taxing statute are not in question, and those "charitable" purposes never rise to the status of a compelling basis for the discriminatory tax that constitutes the infringement of appellant's First Amendment rights.

CONCLUSION

For the foregoing reasons, the decision of the Arkansas Supreme Court should be reversed.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, New York 10036
(212) 944-9800

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No. 85-1370 (9)

In the Supreme Court of the United States

OCTOBER TERM, 1985

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

vs.

CHARLES D. RAGLAND,
Commissioner of Revenues,
Appellee.

ON APPEAL FROM A DECISION OF THE
SUPREME COURT OF ARKANSAS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CITY & REGIONAL MAGAZINE ASSOCIATION IN SUPPORT OF APPELLANT

DONALD M. MIDDLEBROOKS
Counsel of Record
THOMAS R. JULIN
JASON B. MEYER
STEEL HECTOR & DAVIS
Attorneys for the City & Regional Magazine Association
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

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Schad v. Borough of Mt. Emphraim, 452 U.S. 61 (1981) 3

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Supreme Court of Arkansas

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE CITY & REGIONAL MAGAZINE ASSOCIATION IN SUPPORT OF APPELLANT

The City & Regional Magazine Association hereby respectfully moves for leave to file the annexed Brief *Amicus Curiae* in this case in support of Appellant, pursuant to Rule 36.3 of the Rules of this Court.

The Appellant has consented to the filing of this brief, and has filed its consent with the Clerk. Consent of Appellee was requested but refused.

INTEREST OF THE AMICUS CURIAE

The City & Regional Magazine Association (CRMA) is the national organization of general interest magazines which serve the population of specific geographical areas. The 39 magazines which comprise the active membership of CRMA have a total of over two-and-a-half million paying readers.[1] Because of the magazines' inherently local emphasis, almost all of these two-and-a-half million people buy the magazines in the state in which they are published, and almost all would therefore have to pay any sales tax applied to the sale of the magazines.

City and regional magazines are like local newspapers in many ways. Both kinds of publications disseminate information of general public interest, but focus on the concerns of the near-by populace. Both contain classified and display advertising. Both report on news via stories that vary in length and writing style, from "hard news" to short

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1. The member magazines of CRMA (and their approximate paid circulations) are: Arkansas Times (29,000); Atlanta Magazine (56,000); California Magazine (300,000); Chicago Magazine (220,000); Cleveland Magazine (50,000); Columbus Monthly (34,000); Connecticut Magazine (88,000); Country/Mid-Atlantic Magazine (100,000); D (Dallas) Magazine (80,000); Delaware Today Magazine (14,500); Denver Magazine (20,000); Detroit Monthly (44,000); Honolulu Magazine (25,000); Houston City Magazine (60,000); Indianapolis Monthly (30,000); KS (Kansas) Magazine (10,000); Louisiana Life (49,000); Louisville Magazine (20,500); Metropolitan Detroit (90,000); Miami/South Florida (29,000); Milwaukee Magazine (36,000); MPLS/St. Paul Magazine (47,000); NASHVILLE! (24,000); New England Monthly (85,000); New Jersey Monthly (95,000); New Mexico Magazine (90,000); North Shore Magazine (33,500); Oregon Magazine (30,000); Phoenix Metro Magazine (35,000); Pittsburgh Magazine (58,000); Sacramento Magazine (23,500); San Diego Magazine (58,000); San Francisco Focus (158,000); St. Louis Magazine (35,000); Texas Monthly (280,000); Toronto Life (95,000); The Washington (D.C.) Dossier (38,000); Washington (State) Magazine (68,000); West Michigan Magazine (22,000).

"features."[2] Both offer information on local activities, the arts, and restaurants.[3] Both feature political reporting and editorial opinion.[4] Indeed, because individual magazines and newspapers vary to a great extent, perhaps the most ubiquitous distinction between newspapers and city and regional magazines is the quality of the paper on which they are printed.

The interest of CRMA in this appeal is many-fold. First, the publication which is at the center of this case, the Arkansas Times magazine, is a member of CRMA.

Second, each of the 38 other member magazines which are members of CRMA are similarly situated to the Arkansas Times, and each of the 2.5 million paying readers of

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2. Indeed, in head-to-head competition, it is often the magazines that are considered the best source of news. For example, in recent judging, Washington Magazine won 19 awards for excellence in journalism from Sigma Delta Chi, including first place, third place, and honorable mention for "general news reporting"; Milwaukee Magazine received first place awards from the Milwaukee Press Club for best single background story and best locally written story; and D Magazine was cited by the Press Club of Dallas for best news story, and given the outstanding reporting awards of The National Association of Secondary School Principals and the Dallas Bar Association. *CRMA Communicator*, July, 1986, at 3.

3. A nearly universal feature of city and regional magazines is a calendar of entertainment and arts offerings for the local area, and an extensive listing of restaurant reviews. Courts have often recognized the public importance of this sort of consumer information, and that such information is entitled to First Amendment protection. *See, e.g., Bose Corporation v. Consumers Union of United States, Inc.*, 466 U.S. 485, 485 n.1 (1984) (consumer magazine protected); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 65 (1981) ("Entertainment, as well as political and ideological speech, is protected.").

4. The public importance of information such as this has led courts to find First Amendment protection for political and editorial speech imperative. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ... U.S. ....., 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985).

CRMA member publications are similarly situated to the readers of the Arkansas Times. CRMA is thus interest in this case because it raises issues concerning the constitutional limits on the power of the states to discriminate between different industries and the press, and between different types of publications, for the purposes of applying a state sales tax.

Third, several members of CRMA are now involved in disputes with the taxing authorities of their states concerning the application of state sales taxes, and sales tax exemptions, to their publications—disputes quite similar to the one between the parties to this case. As the annexed brief demonstrates, in many states, members of CRMA are subject to sales taxes notwithstanding that other industries and other publications are exempt from the tax. In some instances, because city and regional magazines are by nature "general interest" publications, they, like the Arkansas Times, "fall between the cracks" of apparently broad tax exemptions.

Finally, the CRMA, a news media organization, is interested in the scope of the First Amendment's protections and concerned that its safeguards fully embrace those who report on matters of public concern in some format other than that of a traditional daily newspaper.

PERSPECTIVE OF THE AMICUS CURIAE

The issues before this Court in this case have implications extending far beyond the borders of the State of Arkansas. As the national organization of city and regional magazines, CRMA wishes to emphasize the broader, national ramifications of the questions now before the Court. To that end, the annexed Brief *Amicus Curiae*

surveys the sales tax codes in all 50 states and the District of Columbia, particularly noting that most states have historically exempted the sale of information which is of public concern from their sales taxes.

This brief also analyzes the nature of the Arkansas Gross Receipts Tax to determine whether it is a law of general applicability or a law which has been used to discriminate against the press as well as other industries.

Counsel for this *amicus* has consulted with counsel for the appellant and determined that the arguments advanced here are not duplicative of the arguments advanced in appellant's initial brief.

Respectfully submitted,

DONALD M. MIDDLEBROOKS
Counsel of Record
THOMAS R. JULIN
JASON B. MEYER
STEEL HECTOR & DAVIS
Attorneys for the City & Regional Magazine Association
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

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State of Arkansas, *Biennial Report of the Attorney General For the Biennial Period 1937-39* 9
U.S. Bureau of the Census, "Governmental Finances in 1964-65," GF 65 at 18 21
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No. 85-1370

In the Supreme Court of the United States

OCTOBER TERM, 1985

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

vs.

CHARLES D. RAGLAND,
Commissioner of Revenues,
Appellee.

ON APPEAL FROM A DECISION OF THE
SUPREME COURT OF ARKANSAS

BRIEF AMICUS CURIAE OF THE CITY & REGIONAL MAGAZINE ASSOCIATION IN SUPPORT OF APPELLANT

INTEREST OF THE AMICUS CURIAE

The City & Regional Magazine Association (CRMA) stated its interest in this case in its motion for leave to file a Brief *Amicus Curiae* and incorporates that statement here by reference.

SUMMARY OF ARGUMENT

This Court has held the press may not be taxed differently than other enterprises in the absence of overriding interests of compelling importance.

The Arkansas Gross Receipts Tax is a tax which treats the press differently than other enterprises. Unlike

laws of general applicability which may be applied to the press, the Arkansas tax historically has been used for various policy reasons to encourage some industries and to discourage others.

Arkansas and numerous other states which also use their sales taxes for discriminatory purposes have recognized that application of this particular type of tax against the press infringes on First Amendment freedoms by exempting most publications from the tax which distribute news of public concern.

Refusing the Arkansas Times the protection which other publications are given abridges the First Amendment because the Arkansas Times also publishes matters of public concern.

The State of Arkansas has no overriding interests of compelling importance in imposing its Gross Receipts Tax on sales of Arkansas Times magazine, but not on the sales of other like publications and numerous other enterprises. Accordingly the tax abridges the First Amendment.

ARGUMENT

I.

The Arkansas Gross Receipts Tax Cannot Be Applied to Sales of the Arkansas Times Magazine Absent Overriding Interests

This Court made clear in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner*, 460 U.S. 575 (1983), that taxes which are not of general applicability may not be applied against the press absent overriding

state interests. An analysis of the Arkansas Gross Receipts Tax shows that, for purposes of constitutional analysis, it plainly cannot be labeled a tax of general applicability. It is a discriminatory tax, which like other state sales taxes, historically has not been applied against the press. In addition, the record shows that the Arkansas Times magazine is entitled to the same degree of First Amendment protection which newspapers received in *Minneapolis Star*. Therefore, the Arkansas Gross Receipts Tax, Ark. Stat. Ann. §§84-1901 et seq., may not be assessed against sales of the Arkansas Times magazine in the absence of overriding interests.

A. A Tax Which Treats the Sale of Information Differently From Other Sales May Not Be Upheld Absent Overriding Interests

"A tax that burdens rights protected by the First Amendment cannot stand unless the burden is necessary to achieve an overriding governmental interest."[1] In

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1. *Minneapolis Star*, 460 U.S. at 582 (1983). The City & Regional Magazine Association does not agree with the conclusion reached in dicta in *Minneapolis Star* that "a generally applicable sales tax" may be imposed against the press. 460 U.S. at 586 n.9. That opinion also stated that "Nothing . . . prevents the State from taxing the press in the same manner that it taxes other enterprises. It can achieve its interest in requiring the press to bear its share of the burden by taxing the press as it taxes others, so differential taxation is not necessary to achieve." *Id.* at 590 n.12. Both of these statements—which plainly were unnecessary to the decision before the Court, *id.* at 593 (White, J., concurring)—were based on an overly broad reading of *Breard v. City of Alexandria*, 341 U.S. 622 (1951), a case which upheld a penal ordinance prohibiting door-to-door solicitations, including solicitations by persons selling subscriptions to magazines. The *Breard* case involved no issue regarding taxation and did not, notwithstanding, the protests of the dissenters, disturb such cases as *Follett v. McCormick*, 321 U.S. 573 (1944), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), which had clearly held that a flat tax, such as the sales tax, cannot be imposed on the exer-

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striking down Minnesota's tax on the use of ink and paper, this Court established in *Minneapolis Star* that a tax such as that imposed by the Arkansas Gross Receipts Tax is a tax which burdens a right protected by the First Amendment.

This Court emphasized in *Minneapolis Star,* however, that the First Amendment provides no defense against a regulation of general applicability and cited a number of specific examples of cases where such challenges had been unsuccessful. 460 U.S. at 583. On the other hand, the Court held, "Differential taxation of the press . . . places such a burden on the interests protected by the First Amendment that we cannot countenance such treatment unless the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* at 585. As it did in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), the Court rooted its *Minneapolis Star* decision in history. "There is substantial evidence," the Court concluded, "that dif-

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cise of a privilege granted by the Bill of Rights. "It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him on the privilege of delivering a sermon. . . . The power to tax the exercise of a privilege is the power to control or suppress its employment." *Murdock,* 319 U.S. at 112. In *Breard,* the ban on solicitation was justifiable because it served the important public purpose of protecting the privacy and security of the home and it employed the least restrictive means possible to do so. Therefore, the ordinance was upheld even though it imposed an incidental restriction on First Amendment rights. Similarly, in the recent case of *Arcara v. Cloud Books, Inc.*, ... U.S. ....., 54 U.S.L.W. 5060 (July 7, 1986), the Court upheld a criminal ordinance which required the one-year closing of places of prostitution, lewdness, or assignation, notwithstanding that it limited the petitioner's First Amendment right to sell books. But this Court invalidated the taxes on solicitation in *Follett* and *Murdock* because they bore no relationship to the goal of protecting the home from unwanted or dangerous persons; their sole objective was to raise revenue.

ferential taxation of the press would have troubled the Framers of the First Amendment." 460 U.S. at 583.

Today, then, there is no question that a tax which impacts the exercise of First Amendment rights differently than other activities cannot be justified except by overriding interests.[2] The primary issues for resolution in this appeal are therefore whether the Arkansas Gross Receipts Tax treats sales of the Arkansas Times magazine differently from other sales and, if so, whether the Arkansas Times magazine is protected by the First Amendment.

B. The Arkansas Gross Receipts Tax Treats Sales of the Arkansas Times Magazine Differently From Other Sales

The Arkansas Gross Receipts Tax historically has been used, for policy reasons, to discriminate between different industries, rather than to impose an even-handed tax burden on all taxpayers. This feature of the tax makes it unlike any laws of general applicability which this Court has found inoffensive to First Amendment interests and it creates threats to press freedom which are as great as those created by the Minnesota use tax which this Court held unconstitutional. Therefore, the Court should conclude that the Arkansas tax treats sales of the Arkansas Times differently from the sales of other goods or services.

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2. The *Minneapolis Star* decision also concluded that "Minnesota's ink and paper tax violates the First Amendment not only because it singles out the press, but also because it targets a small group of newspapers." 460 U.S. at 592. The Arkansas Gross Receipts Tax suffers from a similar defect. The focus of this brief, however, is the rule which prohibits taxing of the press differently than other enterprises. The point regarding discrimination between different sectors of the press is discussed in detail in the Appellant's brief. CRMA concurs in the arguments advanced therein.

1. The Arkansas Tax Has Been Used to Favor Some Industries Over Others

Arkansas, like the District of Columbia and the 44 other states which tax the sale of tangible personal property,[3] specifically exempts numerous types of sales from the tax.[4] For example, the tax is not imposed on the sale of cotton,[5] the sale of machinery for use in designated enterprise zones,[6] gate receipts from rodeos,[7] the sale of baby chickens,[8] the rental or lease of equipment used in filming certain motion pictures,[9] certain sales to the Boy Scouts of America, Girl Scouts of America, Boys and Girls Clubs of America, the Poets' Roundtable of Arkansas, 4-H Clubs, FFA Clubs, and Future Farmers,[10] as well as the sale of newspapers and four types of publications.[11]

These exemptions, and numerous others,[12] generally reflect policy decisions to promote particular industries,

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3. Only Alaska, Delaware, Montana, New Hampshire, and Oregon do not impose a sales tax.

4. Ark. Stat. Ann. §84-1904 (1985) lists thirty-six exemptions. *See also* The Commerce Clearing House *State Tax Guide* (1986) which provides a convenient summary of all state tax codes and lists the numerous exemptions to each state sales and use tax.

5. Ark. Stat. Ann. §84-1904(m) (1985).

6. Ark. Stat. Ann. §84-1904(r)(2)(B) (1985).

7. Ark. Stat. Ann. §84-1904(k) (1985).

8. Ark. Stat. Ann. §84-1904(r)(2)(E) (1985).

9. Ark. Stat. Ann. §84-1904(w) (1985).

10. Ark. Stat. Ann. §84-1904(g) (1985).

11. Ark. Stat. Ann. §84-1904(f) and (j) (1985).

12. Ark. Stat. Ann. §84-1904 (1985) lists approximately 36 categories of exemptions.

groups, or activities.[13] Cotton always has been a staple of the Arkansas economy, therefore the Arkansas General Assembly exempts the sale of cotton, seed cotton, lint cotton, and baled cotton from the sales tax. In enacting this exemption, the Arkansas Legislature explained: "The production and sale of cotton and cotton seed in this State, being the State's major industry and being essential to the commercial life of the State, it is the intention of this Act that no sale thereof in this State shall be subject to a sales tax."[14] Similar declarations of intention were authored for the baby chickens and enterprise zone exemptions.[15] All such statements reveal the Assembly's purposeful use of its sales tax to accomplish its political objectives.[16]

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13. This Court has permitted state legislatures broad discretion in using their tax codes to implement rational policy objectives where fundamental interests are not affected. *Williams v. Vermont*, ... U.S. ....., 105 S.Ct. 2465, 2472 (1985); *Regan v. Taxation with Representation of Washington*, 461 U.S. 540, 547-48 (1983). However, where a tax classification affects a fundamental interest, closer scrutiny of the discrimination has been required. *See, e.g., Dunn v. Blumstein*, 405 U.S. 330, 336-42 (1972) (right to travel); *Graham v. Richardson*, 403 U.S. 365 (1971) (suspect criteria); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to vote); *McLaughlin v. Florida*, 379 U.S. 184 (1964) (suspect criteria).

14. 1937 Ark. Acts 189 (Pope's Digest §14093).

15. In enacting the baby chicken exemption, the Legislature declared: "[T]he production and sale of baby chickens is one of the newest and most important industries within the State of Arkansas . . . . [I]t is imperative that this General Assembly assist this new industry in every way possible so that it may be competitive with similar industries of other states." 1949 Ark. Acts 15 §3. In explaining the exemption of machinery purchased for use in "enterprise zones," the Legislature stated: "It is the intent of this Act to provide the foregoing exemptions as incentives to encourage the location of new manufacturing plants in Arkansas, the expansion of existing manufacturing plants in Arkansas, and the modernization of existing manufacturing plants in Arkansas through the replacement of old, inefficient, or technologically obsolete machinery or equipment." 1983 Ark. Acts 870 §3.

16. Arkansas is not alone in using its sales tax to accomplish discrimination between industries. Many states exempt

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These exemptions do not remain static, but rather come and go with a high degree of frequency. The compiler's notes following section 84-1904 reflect that the list of exemptions found in the Arkansas Statutes has been amended by 29 separate acts of the Arkansas General Assembly since 1941, including nine acts in the last six years. Arkansas' practice of frequently altering its list of sales tax exemptions, adding some and retracting others, is not unusual. This holds true in many other states as well.[17] The fluidity of these laws has led one state bar association to describe its state sales and use tax as a "law by exemption."[18] The "potpourri of exemptions," the association concluded, results both from "a good faith effort by the legislature to impose a just and uniform tax on all the residents of this state, . . . the political process and the impact of special interest groups."[19]

In addition to the ordinary exemptions for the sale of particular "property," Arkansas[20] and many other states[21]

Footnote continued—

their favorite industries. *See, e.g.*, Iowa Code Ann. §422.45(26) (West 1986) (sales to farmers of farm equipment and machinery); Ky. Rev. Stat. §139.531 (1984) (horses for breeding); Md. Ann. Code art. 81, §326 (1957) (crab bait; sales of crab and seafood for off-premises human consumption); N.C. Gen. Stat. §105-164.13 (1985) (tobacco sold to manufacturers); Tex. Tax Code Ann. §151.324 (Vernon 1982) (equipment used for mineral exploration or production).

17. For example, Florida's list of exemptions, Fla. Stat. §212.08 (1985), has been amended 81 times since 1949.

18. *Fla. State & Local Taxes*, Vol. I ¶14.03[4] (Fla. Bar 1984).

19. *Id.*

20. The Arkansas Sales Tax applies generally to sales of tangible personal property. The tax does not apply to personal or professional services except for certain services delineated in the statute. *See* Ark. Stat. Ann. §84-1903 (1985).

21. *See, e.g.*, Conn. Gen. Stat. Ann. §12-412(11) (West 1986); Fla. Stat §212.08(7) (1985); Mich. Stat. Ann. §7.525(1) (Callaghan 1936); S.D. Codified Laws Ann. §10-45-12.2 (1982).

do not treat the sale of personal or professional services as a sale of tangible personal property. Thus, the sale of a lawyer's brief, an architect's plans, or a doctor's prescription goes untaxed notwithstanding that all of the transactions are accompanied by the transfer of some incidental tangible property.[22] Oddly, the parties and the Arkansas Supreme Court seem to agree that the sale of the journalist's work product does not fall within this broad exemption to the general scheme of taxation.[23]

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22. *See Larey v. Dungan-Allen, Inc.*, 428 S.W.2d 71, 73 (Ark. 1968).

23. It is difficult to understand why the journalist's work product should not be treated as a service. In 1939, before Arkansas had exempted the sale of any publications from its tax, the Arkansas Attorney General delivered an opinion to the Commissioner of Revenues indicating that "the sale of a newspaper is the sale of service and not tangible property and is therefore not subject to the 2% sales tax." State of Arkansas, *Biennial Report of the Attorney General For the Biennial Period 1937-39* at 42. In *Larey, supra* note 22, the Supreme Court of Arkansas rejected an argument that the sale of photographs should be treated as the rendering of services rather than the sale of tangible personal property. "No doubt," the court held, "the photographers' experience and skill are essential to their work, but it is plain enough that the company's customers would not ordinarily pay for the exercise of that skill if it did not enhance the value of the end product." *Id.* at 73. But the Court went on in *Larey* to distinguish physicians' x-rays and architects' blueprints from photographs. The court wrote, "By contrast, a physician is engaged to diagnose and treat illnesses, not to produce and sell x-rays. An architect is employed to design and supervise the construction of buildings, not to produce and sell blueprints." *Id.* Other state courts have concluded that services which are incorporated in printed material are nontaxable. For example, the Illinois courts concluded that printers who receive copy for printed matter and who contract to print are not engaged in the business of selling tangible personal property. *A.B.C. Electrotype Co. v. Ames*, 364 Ill. 360, 4 N.E. 2d 476 (1936); *H. G. Adair Printing Co. v. Ames*, 364 Ill. 342, 4 N.E.2d 481 (1936), and *J. A. Burgess Co. v. Ames*, 359 Ill. 427, 194 N.E. 565, 566 (1935). *Burgess* stated: "It should be apparent that letterheads, circulars, mail-order catalogs, printed briefs for an attorney, or any other special printed matter, would be without commercial value, and it follows that the printer is engaged

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The sale of the journalist's work product—at least when it takes the form of a general interest magazine published within the State of Arkansas—is treated in an almost unique fashion as a "tangible sale of personal property" which is subject to the sales tax unless exempt. Of course, the Arkansas Supreme Court established in the instant case that sales of the appellant's publication do not fall within the Arkansas exemptions for newspapers or certain types of magazines.[24]

2. The Arkansas Tax Is Not of General Applicability

Compared to other laws which the press has challenged as abridging First Amendment rights, but which this Court

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only in service." *Id.* *Burgess* further observed, "We can perceive no logical difference between the paper upon which a photostatic copy of something is made or a blueprint produced, and that paper which a lawyer uses for writing a will or deed, a doctor for writing a prescription, or an abstractor for showing a chain of title. The paper is a mere incident; the skilled service is that which is required." In *Long v. Roberts & Son,* 3 Div. 212, 176 So. 213 (Ala. 1937), the Supreme Court of Alabama accepted an argument that the work of lithographing, copper plate engraving, and steel die embossing—commercial printing—and book binding do not constitute "selling at retail any tangible personal property," but are essentially services for which no tax is imposed. *See also Southern Bell Telephone and Telegraph Co. v. Department of Revenue,* 366 So.2d 30, 34 (Fla. 1st DCA 1978) (a sale should be treated as a sale of service if the only goods involved in the transaction "have only paper value apart from the information or events they record") (Smith, J., dissenting). *But see Eagerton v. Dixie Color Printing Corp.,* 421 So.2d 1251, (Ala. 1982) (holding the sale of a newspaper to the public is a retail sale of tangible property).

24. If this Court concludes, however, that the Arkansas tax may not constitutionally be imposed on sales of the Arkansas Times magazine, the Court should find that those sales are exempt from the tax. Arkansas Acts §84-1904(1) specifically exempts "Gross receipts or gross proceeds derived from sales for resale which the State is prohibited by the Constitution and Laws of the United States for taxing, or further taxing . . . ."

has upheld because of their equal impact on all enterprises, the Arkansas Gross Receipts Tax is dramatically different.

For example, in *Citizen Publishing Co. v. United States,* 394 U.S. 131 (1969), *Lorain Journal Co. v. United States,* 342 U.S. 143 (1951), and *Associated Press v. United States,* 326 U.S. 1 (1945), the Court rejected arguments that the antitrust laws abridge the First Amendment. But unlike state sales taxes, the antitrust laws had not historically been riddled with "favored industries" exemptions. In *Citizen Publishing,* the Court, in emphasizing the general nature of the antitrust laws, cited a House Subcommittee report which identified only "[p]iecemeal exemptions." *Id.* at 139 n.4. Congress enacted none of the identified exemptions to encourage particular favored industries, but rather because application of the laws to the exempted activities would be impractical or impossible or because the exempted industries were subject to other regulations.[25] Nor has there been a tradition of exempting newspapers or magazines from the operation of the antitrust laws as has been true of sales taxes.[26]

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25. *See, e.g.,* 15 U.S.C.A. §1012(b) (1973) (McCarran-Ferguson Act exempting the "business of insurance"); 46 U.S.C.A. §814 (1973) (allowing the Federal Maritime Commission to approve certain maritime transactions); 15 U.S.C.A. §13(c) (1973) (Non-profit Institutions Act). In explaining the nature of the exemptions to the nation's antitrust laws, two leading authors have observed; "Competition enforced by the antitrust laws is sometimes thought impossible or inappropriate. Accordingly, special statutes have been enacted to modify, complement, or displace the competitive premises and rules of the antitrust laws. The normal antitrust standard may be expressly modified in relatively limited particulars." P. Areeda & D. Turner, *Antitrust Law* ¶221 at 133 (1978).

26. *See Part I. C.* of this brief, *infra.* It was only subsequently that Congress enacted a limited exemption to the antitrust laws to permit failing newspapers to enter into joint operating agreements. 15 U.S.C.A. §1801 (1973). The Newspaper Preservation Act was a direct reaction to the Court's position in *Citizen Publishing. Committee for an Independent P-I v. Hearst Corp.,* 704 F.2d 467, 473-74 (9th Cir. 1983).

The *Minneapolis Star* decision also relied on *Breard v. Alexandria*, 341 U.S. 622 (1951), and *Branzburg v. Hayes*, 408 U.S. 665 (1972), as examples of cases where "generally applicable" regulations had been upheld notwithstanding their impact on First Amendment rights. Both of those cases involved statutes to which there were no exemptions at all. Thus the regulations at issue in these two cases are materially different from the Arkansas Gross Receipts Tax.[27]

The ordinance at issue in *Breard* imposed a blanket prohibition on all door-to-door solicitations and had never exempted solicitations for the sale of periodicals.[28] The issue in *Branzburg* was whether a reporter, like all other citizens, must comply with a grand jury subpoena.[29]

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27. In a series of recent cases decided after *Minneapolis Star*, the Court has upheld criminal ordinances, notwithstanding their impact on First Amendment rights, on the theory that individuals may not "claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities." *Arcara v. Cloud Books, Inc.*, ... U.S. ....., 54 U.S.L.W. 5060, 5062 (July 7, 1986) (order requiring one-year closing of bookstore found to be place of prostitution); *United States v. Albertini*, 472 U.S. ....., 105 S.Ct. 2897, 83 L.Ed.2d 504 (1985) (order barring protester from military base for improper conduct); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (ban on sleeping in park as applied to demonstrators against plight of the homeless). All of the regulations at issue in these cases, like the regulations in *Breard* and *Branzburg*, also truly were of general applicability in that they had not historically exempted the particular forms of expressive activity at issue nor had they exempted particular industries or speakers for political purposes.

28. The ordinance at issue in *Breard* applied to all "solicitors, peddlers, hawkers, itinerant merchant or transient vendors." 341 U.S. at 624. An ordinance of less broad applicability was struck down in *Martin v. Struthers*, 319 U.S. 141 (1943).

29. *Id.* at 685. The Court stated: "The sole issue before us is the obligation of reporters to respond to grand jury subpoenas *as other citizens do* and to answer questions relevant to an investigation in the commission of a crime." *Id.* at 682 (emphasis added). Subsequent to *Branzburg*, a majority of jurisdictions have, however, recognized such a privilege either by statute or judicial interpretation.

The *Minneapolis Star* decision cited *Associated Press v. National Labor Relations Board*, 301 U.S. 103 (1937), as another case for the proposition that a generally applicable tax could be applied to the press. In that case, AP argued that it must have unrestricted freedom, including freedom from the requirements of the National Labor Relations Act, 29 U.S.C.A. §141 et seq. (1973). The Court held, however, "The business of the Associated Press is not immune from regulation because it is an agency of the press. The publisher of a newspaper has no special immunity from the application of general laws." *Associated Press*, 301 U.S. at 132.

The National Labor Relations Act also is truly a regulation of general applicability. The few categories of exempt employers or employees which do exist have been found to be justified not because of any political favoritism toward them, but rather because the purposes of the Act would not be served by applying the Act to them. In *North Whittier Heights Citrus Association v. NLRB*, 109 F.2d 76, 80 (9th Cir. 1940), the court of appeals explained there is a "common denominator" to the exemptions in this Act. Acccording to the court, Congress exempted only employees who would not be "suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain." *Id.*

Minneapolis Star lastly relied on *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), and *Mabee v. White Plains Publishing Co.*, 327 U.S. 178 (1946), in support of the theory that generally applicable taxes are constitutional. In these cases, the Court expressly rejected an argument that the existence of some exemptions to the Fair Labor Standards Act made application of the Act to the press unconstitutional.

In footnote, however, the *Minneapolis Star* opinion rejected the State of Minnesota's argument that the *Oklahoma Press* decision established that "the press cannot successfully challenge regulations on the basis of the exemption of other enterprises." 460 U.S. at 585 n.5. The Court pointed out, "The exempt enterprises in *Oklahoma Press* were *isolated exemptions and not the rule.*"[30] *Id.* (emphasis added). As discussed in point I.B.1. of this argument, exemptions have been the rule rather than the exception when it comes to applying the state sales tax.

3. The Arkansas Tax Poses As Great a Threat to Press Freedom As the Minnesota Use Tax

In each of the cases discussed in the preceding section, the Court found that the regulations at issue did not violate the First Amendment because of their general applicability. When confronted with the tax at issue in *Minneapolis Star,* however, the Court reached the conclusion that the use tax imposed by Minnesota on print and ink could not be so characterized. Although the Arkansas and Minnesota taxes are in some ways distinguishable, a direct comparison of the two taxes discloses that the discriminatory nature of the Arkansas tax creates many of the same threats to First Amendment freedoms as did the Minnesota use tax.

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30. As is true of the exemptions to the antitrust laws, exemptions to the Fair Labor Standards Act do not exist for the purpose of favoring particular industries over others. "The section of the Act granting exemptions deals with employment of a character or with employees of a class to which application of the provisions of the Act for minimum wages and maximum hours is either impractical or impossible, or with employees in occupations in which the conditions of labor are regulated by other statutes, or with employees the greater part of whose labor is in intrastate commerce." *Helena Glendale Ferry Co. v. Walling,* 132 F.2d 616, 619 (8th Cir. 1942).

The *Minneapolis Star* decision identified three distinct dangers which the Minnesota use tax imposed on the press because that method of taxation was not generally applied to other taxpayers. First, the Court held that such a tax "may be used to destroy a selected group of taxpayers by burdensome taxation." 460 U.S. at 585. Second, the Court found the tax could "operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id.* Finally, the Court held the tax "suggests that the goal of the regulation is not unrelated to the suppression of expression, and such a goal is presumptively unconstitutional." *Id.* The Arkansas tax also creates all of these threats to press freedom.

Many newspapers and magazines are only marginally profitable or not profitable at all. Among the least profitable publications are those which espouse politically unpopular viewpoints or which appeal to a fairly small segment of the population. For these publications, the issue of whether they must pay the sales tax is an issue of survival. In essence, many of these publications will continue to exist only if they are untaxed. If application of the Arkansas tax to sales of the Arkansas Times is sustained in light of the legislature's free discrimination between industries, no marginally profitable publication will be safe. When a tax is discriminatory, like the Arkansas tax, none of the safeguards which accompany regulations of general applicability comes into play. The tax could easily then be imposed on any presently exempt publications without imposing the tax on those favored industries which enjoy existing or future exemptions.

In addition, the power to exempt or repeal exemptions to this tax can be used as a perpetual threat against news-

papers or magazines. How many editorials will go unwritten, how many investigations will be left undone, how many profiles of political personalities will be discarded because of the economic fears that the sales tax exemption for particular types of publications, or all publications, will be amended out of the statute next year? Under the rational basis standard, the potential for political abuse, if only by the perpetual and undetectable threat to eliminate the existing exemption in the annual sales tax amendment process, is so great that that standard cannot apply. Generally applicable business regulations which have not historically been used as political carrots or sticks and which historically have been as fully applicable to the press as to any other industry pose no similar threat.

Even if the state could articulate some rational basis for treating sales of the Arkansas Times magazine differently than the sales of numerous other properties and services, the differential treatment in and of itself suggests that the Arkansas General Assembly is attempting to regulate expressive activity, as was the case in Minnesota.

Perhaps the strongest argument for attempting to distinguish the Arkansas and Minnesota taxes is that Arkansas is applying a sales tax to the sale of magazines rather than a "use tax."[31] But as shown by the analysis above this point of distinction is of very little importance because

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31. Although the Minnesota tax at issue in *Minneapolis Star* was characterized as a "use tax," the Court pointed out that the tax at issue was really not the same type of tax as a "use tax" at all. A "use tax" generally is used solely for the purpose of "protect[ing] the State's sales tax by eliminating the residents' incentive to travel to States with lower sales tax to buy goods rather than buying them in Minnesota." 460 U.S. at 577. The Minnesota tax in *Minneapolis Star*, however, was not used for this purpose at all. Rather, it was used precisely for the same purpose as the sales tax—to raise revenue.

the historical discriminatory nature of the Arkansas tax creates the same dangers as the Minnesota tax created.

In addition, although this Court referred to the Minnesota tax as "singling out the press," that tax was no more directed at the press alone than is the Arkansas tax. The Minnesota use tax applied without exception to all industries and to all nonexempted uses of tangible personal property.[32]

C. In Recognition of the Constitutional Dangers of Imposing the Sales Tax on the Press, Arkansas and Other States Have Not Generally Done So

The Arkansas Gross Receipts (Sales) Tax Act has not historically been applied to most sales of information of importance to the citizens of Arkansas. Section 84-1904 provides that the following receipts or proceeds are exempt:

> (f) Gross Receipts or Gross Proceeds derived from the sale of newspapers . . . ."
>
> * * *

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32. The first paragraph of the statute at issue in *Minneapolis Star*, Minn Stat. §297A.14 (1982) provided: "For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the tax imposed by section 297A.02 [the sales tax] was paid on said sales price." It was this tax which was applied to the press by virtue of an amendment which provided that "Notwithstanding any other provisions of section 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication . . . is subject to the tax imposed by this section."

(j) Gross Receipts or Gross Proceeds derived from the sale of religious, professional, trade and sports journals and/or publications published and printed within this State and when sold through regular subscriptions.

These exemptions have been a part of the Arkansas statutes almost since the sales tax was first imposed.[33] A survey of other state tax codes reflects that the Arkansas exemption for newspapers and some other publications is not unprecedented. Most of the states which impose a sales tax also have provided at least some type of exemption for the sale of newspapers, magazines or other sales of information which is deemed to be important to the citizens of the particular state.[34] These exemptions generally also

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33. When Arkansas first enacted its sales tax, 1935 Ark. Acts 233, it made no exemption for sales of publications. However, as noted in footnote 23 *supra*, the Attorney General of Arkansas concluded in 1939 that the sale of a "newspaper" is not the sale of tangible personal property and therefore not taxable. The "newspaper" exemption was added by Acts of Arkansas 1941, No. 386, section 4. The "journals and/or publications" exemption was added by Acts of Arkansas 1949, No. 152.

34. The States have not, however, been uniform in their attempt to define which information providers should be exempt and which should be non-exempt. *See* Ariz. Rev. Stat. Ann. §42-1317A.7 (1985) (magazines or periodicals or publications encouraging tourist travel); Ark. Stat. Ann. §84-1904(f) & (j) (1947) (gross receipts or gross proceeds from sale of newspapers; religious, professional, trade and sports journals and/or publications printed and published in-state and sold through regular subscriptions); Cal. Rev. & Tax. Code §6362 (West 1970) (newspapers or periodicals regularly issued); Conn. Gen. Stat. Ann. §12-412(6) (West 1986 Supp.) (magazine subscriptions and newspapers circulated among the public); D.C. Code Ann. §47-2005(6), §47-2001(r) (1981) (newspapers and publications for religious, scientific, charitable, or educational purposes); Fla. Stat. §212.08(6) & (7)(e) (1985) (newspapers and magazine subscriptions); Idaho Code §63-3622I (1985) (religious literature, pamphlets, periodicals, tracts and books published and sold by a bona fide church or religious denomination); Ind. Code Ann. §6-2.5-5-17 (Burns 1984) (newspapers); Iowa Code

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Ann. §422.45.9 (West 1986) (newspapers, free newspapers, or shoppers' guides); La. Rev. Stat. Ann. §47:305(4)(a)(v) (West 1986) (newspapers); Me. Rev. Stat. Ann. tit. 36, §1760.13 & .14 (1964) (bibles and publications issued at average intervals); Md. Ann. Code art. 81, §326(n) (1957) (printing and sales of newspapers of any and all types); Mass. Gen. Laws Ann. Ch. 64H, §6(m) (West 1969) (newspapers, magazines, books required for instructional purposes in educational institutions, books used for religious worship, publications of any non-profit corporation, foundation, organization or institution); Mich. Stat. Ann §7.525(h) (Callaghan 1986) (newspapers and periodicals delivered via second-class mail; any newspaper or periodical of general circulation established not less than two years and published not less than once a week); Minn. Stat. Ann. §297A.25(i) (West 1986) (any publication regularly issued at average intervals excluding magazines and periodicals sold over the counter); Miss Code. Ann. §27-65-111(b) (1972) (daily or weekly newspapers; periodicals or publications of scientific, literary or educational organizations exempt from federal income taxation); Mo. Ann. Stat. §144.030.2 (10) (Vernon 1986) (newsprint used in newspapers published for dissemination of news); Neb. Rev. Stat. §77-2704(d) (1985) (any regularly issued newspaper published at intervals not exceeding one week provided they contain matters of general interest and reports of current events); Nev. Rev. Stat. §372.315 (1981) (tangible personal property which becomes an ingredient or component part of any regularly issued newspaper); N.J. Stat. Ann. §54:32B-8(e) (West 1985) (newspapers, magazines, and periodicals); N.M. Stat. Ann. §7-9-63, §7-9-64 (1978) (newspapers and magazines); N.Y. Tax Law §115(a)(5) (McKinney 1986) (newspapers and periodicals); N.C. Gen. Stat. §105-164.13 (14) & (28) (1985) (Holy Bibles; newspapers sold by street vendors and door-to-door deliveries; magazines sold door-to-door); N.D. Cent. Code §57-39.2-04 (25) (1983) (Bibles, hymnals, textbooks, and prayerbooks sold to nonprofit religious organizations); Ohio Rev. Code Ann. §5739.02(B)(4) (Page 1985) (newspapers; magazine subscriptions shipped by second class mail); Okla. Stat. Ann. tit. 68, §1357(c) (West 1985) (carrier sales of newspapers and periodicals; sales of newspapers and periodicals; sales of newspapers and periodicals where any individual transaction does not exceed seventy-five cents); Pa. Stat. Ann. tit. 72, §3403-203(t)(v) (Purdon 1964) (religious publications sold by religious groups; bibles; periodicals and publications published at regular intervals); R.I. Gen. Laws §44-18-30(B)(HH)(QQ) (1985 Supp.) (periodicals; bibles; promotional and product literature of boat manufacturers); S.C. Code Ann. §12-35-550(7) (Law. Co-op. 1976) (newsprint paper; newspapers; religious publications); S.D. Codified Laws Ann. §10-45-12.1 (1986 Supp.) (newspaper sales and subscriptions); Tenn. Code Ann. §§67-6-323, 329 (3) (1983) (religious publications; newspapers); Tex. Tax Code Ann. §§151.319, 320 (Vernon 1982) (newspapers; magazine

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have been a part of the sales tax codes from the time that the states first imposed the taxes.[35]

These statutes can be interpreted in several ways. First, they plainly reflect a general consensus of the nation's legislators that the flow of information about matters of public concern should not be impeded by the imposition of sales taxes. Second, these exemptions can be interpreted as a conclusion by the states that imposition of their sales taxes on newspapers and magazines is constitutionally proscribed. Most of the states enacted sales taxes after this Court announced its decision in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), and most of those

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subscriptions entered as second class mail); Utah Code Ann. §59.15-4(b)(1) (1985) (newspapers); Vt. Stat. Ann. tit. 32, §9741(15) (1981) (newspapers with at least 10 percent news of general interest); Va. Code §58.1-608(13) (1950) (any daily or regularly issued publication excluding newsstand sales of the same); Wash. Rev. Code Ann. §82.08.0253 (1981) (newspapers); W.Va. Code §11-15-9 (1983) (sales of newspapers delivered by route carriers); Wis. Stat. Ann. §77.54(15) (West 1985) (newspapers and regularly issued periodicals); Wyo. Stat. §39-6-405 (xxi) (1977) (sale of newspapers).

35. The following is a compilation of the session law which first enacted the sales tax exemption referred to in note 34 *supra*. 1935 Ariz. Sess. Laws ch. 77; 1941 Cal. Stats. ch. 247 p. 1348 §28; 1948 Conn. Acts 1 §§5-7 (Spec. Sess.); 63 Stat. 115, ch. 146, tit. I, §128 (1949); 1949 Fla. Laws ch. 26319, §8; 1965 Idaho Sess. Laws ch. 195, §22(e)&(j); 1963 Ind. Act. ch. 30, §4 (Spec. Sess.); 1970 Iowa Acts ch. 1201 §2; 1948 La. Acts 9, §5(d); 1951 Me. Laws ch. 250, §10 XI & XII; 1947 Md. Laws ch. 281, §261(n)&(o); 1967 Mass. Acts ch. 757 §6(m); 1950 Mich. Pub. Acts 10 §4a(h); 1967 Minn. ch. 32, art. 13, §25(i) (Spec. Sess.); 1978 Miss. Laws ch. 347 §8(b); 1939 Mo. Laws p. 855 §3; 1967 Neb. Laws, sec. 4(d); 1969 Nev. Stat. ch. 306 §9; 1966 N.J. Laws ch. 30 § 8(e); 1969 N.M. Laws ch. 144 §§53 & 54; 1967 N.Y. Laws ch. 93 §1115(5); 1957 N.C. Laws ch. 1340 §5; 1967 N.D. Sess. Laws ch. 459 §29; 1933 Ohio Laws H.B. 134 §2; 1981 Okla. Sess. Laws ch. 313; 1963 Pa. Laws No. 43 §11; 1947 R.I. Pub. Laws ch. 1887 §31B; 1951 S.C. Acts No. 379 p. 686; 1935 S.D. Sess. Laws ch. 205 §34(a); 1947 Tenn. Pub. Acts ch. 3 §6; 1941 Tex. Gen. Laws ch. 184; 1969 Vt. Acts No. 144, subch. 2; 1966 Va. Acts ch. 151; 1935 Wash. Laws ch. 180 §19(c); 1974 W. Va. Acts ch. 136; 1969 Wis. Laws ch. 154 §260; 1979 Wyo. Sess. Laws ch. 41 §1.

enactments included exemptions for newspapers and magazines in their original form.. It therefore logically can be inferred that state legislatures have concluded *Grosjean* makes taxation of the sale of information—at least through imposition of their selectively applied sales taxes —impermissible.

The *Grosjean* decision itself cited an attempt by a state legislature to tax newspapers in 1785 as one of the historical events with which the Framers of the Constitution were cognizant and which "did much to bring about the adoption of the [first] amendment." 297 U.S. at 248. This passage may well have signaled to state legislators that use of their discriminatory sales taxes would not be tolerated. At the same time, the *Grosjean* decision did not discourage state legislatures from subjecting newspaper and magazine owners to other forms of taxation such as property and corporate income taxes. The lack of exemptions from these taxes in the states can logically be interpreted as a recognition by the states that those were the forms of taxation to which the *Grosjean* decision was referring when it stated, "It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government." 297 U.S. at 250. It warrants emphasis that this passage spoke only of the taxation of *owners*, rather than the taxation of *sales*.

In recent years, economic pressures have forced the states to look to every possible source of revenue and many exemptions to sales tax laws have been eliminated.[36]

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36. In 1965, state sales and use taxes raised a total of $17.1 billion. U.S. Bureau of the Census, "Governmental Finances in 1964-65," GF 65 at 18. By 1980, states had more than tripled their sales and use tax revenue to $53 billion. U.S. Bureau of the Census, "Quarterly Summary of State and Local Tax Revenue," GT 80 No. 4, at 1, Table A (1981).

Even so, exemptions which exist for newspaper and magazine sales have for the most part remained intact. This is yet another indication that the states recognize the constitutional problem with imposing this particular tax on the press.

Several state court decisions tend to confirm that the intention of the state legislatures was both to avoid First Amendment problems and to encourage the free flow of information. For example, in *Sears, Roebuck & Co. v. State Tax Commission,* 370 Mass. 127, 345 N.E.2d 893, 896 (1976), the Massachusetts Supreme Judicial Court struck down a tax on advertising supplements inserted into Massachusetts newspapers. The court wrote, "We are confirmed in our reading of the statute by the obvious intention of the Legislature to free newspapers of a large part of the burden of sales and use taxes. . . . A tax on the advertising revenue of newspapers could have a devastating effect on First Amendment freedoms." *Id.* at 896 (citing *Grosjean v. American Press Co.,* 297 U.S. 233 (1936)).

Whatever the actual reason that most states have exempted sales of various types of information from their sales taxes, there is now a clear tradition in the United States of exempting such sales and it should be viewed as persuasive evidence that imposition of such taxes on the press would violate the First Amendment.[37]

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37. This Court previously has looked to a traditional lack of press regulation as persuasive evidence that the First Amendment stands as a bulwark against such regulation. *See Press-Enterprise Co. v. Superior Court,* ..... U.S. ....., 54 U.S.L.W. 4869, 4871 (June 30, 1986); *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984); *Globe Newspaper Co. v. Superior Court,* 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980). The lack of a tradition of exemption for the sale of machinery used in printing led the Illinois Supreme Court to uphold a tax on printing presses in *Chicago*

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The existence of a tradition of exemption also poses another serious danger to the press. State legislatures and courts could easily use the threat of ending that tradition as a means to control the press. For those publications with inflexible budgets, declining revenues, or marginal profits, the fear that their years of exemption from taxation may be ended may well chill much expression.

D. Arkansas Times Magazine Is Entitled to the Same First Amendment Protection Afforded to Other Members of the Press

The transaction at issue—sale of the Arkansas Times magazine to members of the general public—plainly is entitled to the protection which the First and Fourteenth Amendments afford other arms of the press.

In the *Grosjean* decision itself, the Court addressed the scope of the First Amendment protection it was affording when it stated, "The predominant purpose of the grant of immunity here invoked was to preserve an untrammeled press as a vital source of information. *The newspapers, magazines and other journals of the country,* it is safe to say, have shed more light on the public and

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Tribune Co. v. Johnson, 106 Ill.2d 63, 87 Ill. Dec. 505, 477 N.E.2d 486 (1985), *appeal dismissed,* ..... U.S. ....., 54 U.S.L.W. 3270 (1985) (White, Stevens, and O'Connor, JJ., dissenting), notwithstanding that the Illinois Legislature enacted a recent amendment to its sales tax exempting machinery used in other types of manufacturing processes. Exclusion of magazines such as the Arkansas Times from an exemption does not alter the fact that the press generally has been exempted from this tax because exclusion of the Times based on its content is itself constitutionally prohibited. *Police Department of Chicago v. Mosley,* 408 U.S. 92, 96 (1972). And, as shown by *Point I.D., infra,* the Arkansas Times is entitled to the same First Amendment protection as other members of the press.

business affairs of the nation than any other instrumentality of publicity; and since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern." 297 U.S. at 250 (emphasis added). The Court expressed no words of limitation in this passage, but rather extended First Amendment protection to any means of communicating important information, expressly including magazines.

In a number of recent decisions, this Court has held that the First Amendment "both fully protects and implicitly encourages" all types of "discussion of 'matters of public concern' " irrespective of the medium of transmittal or the identity of the speaker.[38]

The record in this case discloses that the Arkansas Times magazine is a publication which publishes matters of public or general concern as do other protected media. The affidavit of Allen Leveritt, publisher of the Arkansas Times, shows the journal has a monthly circulation of 23,000 subscriptions and 5,000 single copy sales.

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38. *Pacific Gas & Electric Co. v. Public Utilities Comm'n*, ... U.S. ....., ..., 106 S.Ct. 903, 908 (1986) (public utility's newsletter the content of which ranged from energy-saving tips to stories about wildlife conservation, and from billing information to recipes) (Powell, J., announcing judgment of the Court in which Burger, C.J., and Brennan and O'Connor, JJ., concurred); *Consolidated Edison Co. v. Public Service Comm'n of New York*, 447 U.S. 530 (1980) (same); *First National Bank of Boston v. Belotti*, 435 U.S. 765 (1978). *See also City of Los Angeles v. Preferred Communications, Inc.*, ... U.S. ....., 54 U.S.L.W. 4542, 4543 (April 29, 1986) (expressing the view that " 'the business of cable television, like that of newspapers *and magazines,*' " "plainly implicate[s] First Amendment interests") (quoting brief of respondents emphasis added); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, ... U.S. ....., 105 S.Ct. 2939, 86 L.Ed.2d 593 (1985) (holding that constitutional protections against libel and slander actions protect all speech regarding matters of public concern).

In her deposition, H. Gail Price, manager of the State Sales and Use Tax Section of the Department of Finance, conceded that the Arkansas Times and the state's major daily newspaper are different only in format and depth of coverage. She testified:

> From a professional standpoint, I don't know how to compare the Arkansas Gazette with the Arkansas Times but personally feel they are different because the Times is more of a magazine. It usually goes into more detail on its article[s] but that is a personal observation, not a professional one. I would not take exception to the statement that they both contain articles concerning sports, religion, political and social events. (T. 196).

Many states which have considered the scope of their sales tax exemptions have construed their statutes broadly to encompass publications which are comparable to the Arkansas Times magazine. For example, the Supreme Court of Illinois ruled that magazines were exempt from sales tax under a statute that provided "the purchase, employment and transfer of such tangible personal property as newsprint and ink for the primary purpose of conveying news (with or without other information) shall not be deemed to be a purchase, use or sale of tangible personal property." *Time, Inc. v. Hulman*, 31 Ill.2d 344, 201 N.E. 2d 374 (1964). Rejecting the arguments that the exemption statute encompassed only newspapers, the Illinois court recognized that newspapers and magazines compete for subscriptions and advertising, and that a contrary construction of the statute would create unconstitutional discrimination in favor of newspapers and against magazines. *Id.* at 352, 201 N.E.2d at 378. The court wrote:

> The power of the legislature to establish classifications which will extend a privilege to one group while denying it to another is well established. It is only that

classification which "unreasonably discriminates" against one group or another that violates the constitutional guaranties. After a full and careful consideration of the classes of newspapers and magazines disseminating news and information, we are of the opinion that there is no real or substantial difference between newspapers and plaintiffs' magazines. The same consideration which induced the legislature to recognize that publishers of newspapers were not within the taxable occupation carries over to publishers of news magazines or other news periodicals. *Id.* at 352-53, 201 N.E.2d at 378.

In one group of cases courts have held that state sales tax exemptions delineated for "newspapers" also extend to advertising supplements and other publications devoted primarily to advertisements.[39] In one case, the Vermont court employed a dictionary definition of "newspaper" to conclude that a weekly publication which consisted almost entirely of advertisements was within the state's "newspaper" exemption. *Hawden,* 139 Vt. at 39, 422 A.2d at 257.

Other types of publications, such as student newspapers, a map listing the addresses and directions to movie stars' homes, a "confidential" business publication, a tax publication, and a publication written for estate planners, all have been held to be well within the definition of exempt periodicals.[40]

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39. *Greenfield Town Cryer, Inc. v. Commissioner of Revenue,* 385 Mass. 692, 433 N.E.2d 898 (1982); *Sears, Roebuck & Co. v. State Tax Commission,* 370 Mass. 127, 345 N.E.2d 893 (1976); *Daily Law Record Co. v. James,* 629 S.W.2d 348 (Mo. 1982) (en banc); *Hawden, Inc. v. Department of Taxes,* 139 Vt. 37, 422 A.2d 255 (1980), *appeal dismissed,* 451 U.S. 977 (1981).

40. *See Campus Communications, Inc. v. Department of Revenue,* 473 So.2d 1290 (Fla. 1985) (construing exemption for sale of "newspapers" to include bulk sale of free distribution

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All of these cases recognize that the constitutional values which the exemptions were intended to protect is the free flow of information which is important to the citizens of a self-governing society. The Arkansas Supreme Court, in placing a narrow construction on its exemption for newspapers and magazines is aberational; that state's application of the statute as applied to sales of the Arkansas Times magazine now requires this Court to hold such taxation unconstitutional.[41]

II.

The State of Arkansas Has No Compelling Reasons for Imposing a Tax on the Appellant's Distribution of Information

The State of Minnesota argued in the *Minneapolis Star* case that raising revenue for the state was a com-

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student newspapers by printer to publisher and observing "a newspaper is a newspaper is a newspaper"); *Welton v. Los Angeles,* 18 Cal.3d 497, 556 P.2d 1119, 134 Cal.Rptr. 668 (1976); *Business Statistics Organization v. Joseph,* 299 N.Y. 433, 87 N.E.2d 505 (1949); *Research Institute of America, Inc. v. Department of Taxation & Finance,* 99 Misc.2d 243, 415 N.Y.S.2d 928 (1979). In *Welton,* a seller of maps in Hollywood, California, was exempted under the classification of "periodical" from both a city business tax and a state sales tax. The Supreme Court of California wrote that the "commercial character of [the seller's] activities does not deprive her of constitutional protection." 556 P.2d at 1122. The California Court supported its conclusion with three of this Court's decisions: *Bigelow v. Virginia,* 421 U.S. 809 (1975); *Ginzburg v. United States,* 383 U.S. 463 (1966); *Smith v. California,* 361 U.S. 147 (1959). The California court added, "The fact that some may view the map as lacking opinion, newsworthiness or information of social worth, is constitutionally irrelevant. This court may not—consistent with its obligations to the Constitution—examine the map's content or venture an opinion of its social worth." 556 P.2d at 1122.

41. As observed in footnote 24 *supra,* a section of the Gross Receipts Tax exempts those sales which cannot constitutionally be taxed and therefore the statute itself need not be invalidated.

pelling interest which justified its tax in that case, but the Court rejected that argument as unpersuasive because the state had many other means available to raise revenue other than imposing a discriminatory tax against the press. The Court wrote:

> The main interest asserted by Minnesota in this case is the raising of revenue. Of course that interest is critical to any government. Standing alone, however, it cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax which singles out the press.[42]

This Court also concluded in *Minneapolis Star* that any interest advanced by Minnesota to justify its scheme would be inadequate because the Minnesota tax not only singled out the press from different treatment, but because it "targets a small group of newspapers." 460 U.S. at 592. "Whatever the motive of the legislature in this case, we think that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme." *Id.*

The State of Arkansas can offer no stronger reasons than did Minnesota for imposing its tax to sales of the

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42. 460 U.S. at 586. In support of the conclusion that a generally applicable tax could be imposed, the Court cited *United States v. Lee*, 455 U.S. 252 (1982), as standing for a different but analogous proposition. The *Lee* case does not actually support the proposition, however, because there the Court found the United States had an overriding interest in the taxing scheme at issue and for that reason, rather than the general applicability of the tax, this Court upheld the tax.

Arkansas Times and therefore the imposition of the Arkansas tax on such sales would violate the First and Fourteenth Amendments.

CONCLUSION

The decision of the Supreme Court of Arkansas should be reversed and sales of the Arkansas Times magazine should be held to be exempt from the Arkansas Gross Receipts Tax because application of that tax to such sales would abridge the First and Fourteenth Amendments of the United States Constitution.

Respectfully submitted,

DONALD M. MIDDLEBROOKS
Counsel of Record
THOMAS R. JULIN
JASON B. MEYER
STEEL HECTOR & DAVIS
Attorneys for the City & Regional Magazine Association
4000 Southeast Financial Center
Miami, Florida 33131-2398
(305) 577-2810

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing motion for leave to file a brief *amicus curiae* and brief *amicus curiae* of the City & Regional Magazine Association were served upon each of the following, who comprise all of the parties required to be served, by placing said copies in the United States Mail, first class postage pre-paid, in accordance with Rule 28.3 of the Rules of this Court, on or before the 1st day of August, 1986.

Anne Owings Wilson
Counsel of Record for Appellant
House, Wallace, Nelson & Jewell, P.A.
1500 Tower Building
Little Rock, Arkansas 72201

Joseph Svoboda
Counsel of Record for Appellee
Department of Finance and Administration
Post Office Box 1272-L
Little Rock, Arkansas 72203

DONALD M. MIDDLEBROOKS

(10)

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No. 85-1370

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

ARKANSAS WRITERS PROJECT, INC.,

Appellant,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,

Appellee.

On Appeal from The Supreme Court of Arkansas

Motion for Leave to File Brief of *Amici Curiae* and Brief of *Amici Curiae* The Miami Herald Publishing Company and The American Newspaper Publishers Association

RICHARD J. OVELMEN
One Herald Plaza
Miami, Florida 33101
(305) 376-2868

EDWARD SOTO
COUNSEL OF RECORD
Southeast Financial Center
Suite 4350
Miami, Florida 33131-2355
(305) 372-3304

LAURA BESVINICK
SHARPSTEIN & SHARPSTEIN, P.A.
3043 Grand Avenue, PH 1
Coconut Grove, Florida 33133
(305) 442-8100

GERALD B. COPE, JR.
GREER, HOMER, COPE & BONNER, P.A.
Southeast Financial Center
Suite 4360
Miami, Florida 33131
(305) 579-0060

Attorneys for *Amici Curiae*

[List of counsel continued on inside cover]

31pp

Of Counsel:

W. Terry Maguire
General Counsel
The American Newspaper
Publishers Association
The Newspaper Center
11600 Sunrise Valley Drive
Reston Virginia 22091
(703) 648-1055

Parker Thomson
Thomson Zeder Bohrer Werth
Adorno & Razook
4900 Southeast Financial Center
Miami, Florida 33131
(305) 350-7200
Attorney for The Miami Herald
Publishing Company

No. 85-1370

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Appellee.

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Motion for Leave to File Brief of *Amici Curiae*

The Miami Herald Publishing Company, an unincorporated division of Knight-Ridder Inc., and The American Newspaper Publishers Association (the "*amici*") hereby respectfully move for leave to file the attached brief of *amici curiae* in this case. The consent of counsel for the appellant has been obtained. The consent of counsel for the appellee was requested but refused.

The Miami Herald Publishing Company is an unincorporated division of Knight-Ridder Inc. which publishes *The Miami Herald*, a daily newspaper of general circulation throughout the State of Florida. Knight-Ridder Inc. is a nationwide communications company engaging in the publication of magazines, books, and 28 daily newspapers.

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers, with an aggregate

circulation exceeding 90% of the national total for daily and Sunday newspapers.

The *amici* would be adversely affected if the Court upheld the Arkansas statute at issue in this case. The *amici* are particularly concerned about the suggestion made by the Supreme Court of Arkansas that a sales tax of general applicability could be imposed on newspapers.

The appellant in this case argues primarily that the Arkansas statute is unconstitutional because it singles out certain periodicals for taxation and exempts others. The appellant makes no historical argument regarding the relationship between taxation and the First Amendment. In comparison, the brief which the *amici* are requesting permission to file will argue that a sales tax of general applicability imposed on newspapers would violate the First Amendment. The brief of *amici* will focus on the historical background and the intent of the Framers in drafting the First Amendment.

Respectfully submitted,

EDWARD SOTO
COUNSEL OF RECORD
Southeast Financial Center
Suite 4350
Miami, Florida 33131-2355
(305) 372-3304

No. 85-1370

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OCTOBER TERM 1985

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Brief of *Amici Curiae* The Miami Herald Publishing Company and The American Newspaper Publishers Association

RICHARD J. OVELMEN
One Herald Plaza
Miami, Florida 33101
(305) 376-2868

EDWARD SOTO
COUNSEL OF RECORD
Southeast Financial Center
Suite 4350
Miami, Florida 33131-2355
(305) 372-3304

LAURA BESVINICK
SHARPSTEIN & SHARPSTEIN, P.A.
3043 Grand Avenue, PH 1
Coconut Grove, Florida 33133
(305) 442-8100

GERALD B. COPE, JR.
GREER, HOMER, COPE & BONNER, P.A.
Southeast Financial Center
Suite 4360
Miami, Florida 33131
(305) 579-0060

Attorneys for *Amici Curiae*

[List of counsel continued on inside cover]

Of Counsel:

W. TERRY MAGUIRE
GENERAL COUNSEL
THE AMERICAN NEWSPAPER
PUBLISHERS ASSOCIATION
The Newspaper Center
11600 Sunrise Valley Drive
Reston, Virginia 22091
(703) 648-1055

PARKER THOMSON
THOMSON ZEDER BOHRER WERTH
ADORNO & RAZOOK
4900 Southeast Financial Center
Miami, Florida 33131
(305) 350-7200
ATTORNEY FOR THE MIAMI HERALD
PUBLISHING COMPANY

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No. 85-1370

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

ARKANSAS WRITERS PROJECT, INC.,
Appellant,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,
Appellee.

On Appeal from The Supreme Court of Arkansas

Brief of *Amici Curiae* The Miami Herald Publishing Company and The American Newspaper Publishers Association

The Miami Herald Publishing Company, an unincorporated division of Knight-Ridder Inc. ("The Miami Herald"), and The American Newspaper Publishers Association ("ANPA") respectfully submit this brief as *amici curiae*. The *amici* support Appellant Arkansas Writers Project, Inc. and urge the Court to reverse the decision of the Arkansas Supreme Court.[1]

INTERESTS OF THE AMICI

The Miami Herald Publishing Company is an unincorporated division of Knight-Ridder Inc. which publishes *The Miami Herald*, a daily newspaper of general circulation

[1] The decisions below are reported as *Ragland v. Arkansas Writers Project, Inc.*, 287 Ark. 155, 697 S.W.2d 94, *supplementary opinion on rehearing*, 287 Ark. 155, 698 S.W.2d 802 (1985).

throughout the State of Florida. Knight-Ridder Inc. is a nationwide communications company engaging in the publication of magazines, books, and 28 daily newspapers.

ANPA is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers, with an aggregate circulation exceeding 90% of the national total for daily and Sunday newspapers.

The *amici* would be adversely affected were the Court to uphold a state statute which imposes a discriminatory tax burden on certain elements of the press, or discriminates in its incidence based on the content of the expression published.

Of special concern to the *amici* is the suggestion by the Supreme Court of Arkansas that a sales tax of general applicability could be imposed on newspapers.[2] The Miami Herald and ANPA have a substantial interest in explaining why sales taxes on newspapers are unconstitutional and why the Framers of the First Amendment viewed them with particular alarm.[3]

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[2] The states have largely avoided attempts to raise tax revenues from newspaper advertising and circulation sales. Only New Mexico and Hawaii currently tax newspaper advertising sales. All-State Sales Tax Reporter (CCH) ¶¶ 7-025.16, 7-025.36. At the time of this Court's opinion in *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) only six states provided newspapers no exemption of any kind from their sales taxes. Eight states presently apply their sales taxes without modification to newspapers. All-State Sales Tax Reporter (CCH) ¶ 7-025.

[3] At least in part due to dictum in *Minneapolis Star, supra* at 588 n.9, Florida has enacted "Sunset" legislation which would automatically repeal press-related sales tax exemptions, as well as other sales tax exemptions, unless they are reenacted at the 1987 session of the Florida legislature. Ch. 86-166, Laws of Florida, 1986 Fla. Law Weekly Sess. Law Reporter 822. If this taxation occurs, Florida newspapers would in a single year suffer a devastating increase in their tax burden amounting to millions of dollars.

SUMMARY OF THE ARGUMENT

The Arkansas sales tax is unconstitutional as applied to magazines or periodicals of general interest because it "singles out a few members of the press" for taxation, and no interest "can justify the scheme." *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 592 (opinion of the Court); *id.* at 593-94 (White, J., concurring). That this discriminatory classification is predicated on the magazines' content only renders it the more constitutionally infirm. *See Police Department v. Mosley*, 408 U.S. 92, 95-96 (1972); *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

This Court need do no more than apply these two fundamental constitutional principles to decide this case. The rehearing decision of the Arkansas court, however, invites adjudication of the larger question regarding the constitutionality of a general sales tax as applied to all of the press. This Court has suggested on several occasions, most recently in *Minneapolis Star*, that "nondiscriminatory taxes on the receipts or income of newspapers would be permissible." *Id.* at 588 n.9, 589 n.12.[4] However, the Court has never had this issue before it on the merits in a case which required its resolution, nor has it

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[4] Conceding that it relied on dictum, the Court stated, "[O]ur cases have consistently recognized that nondiscriminatory taxes on the receipts or income of newspapers would be permissible," 460 U.S. at 588 n.9, *citing Branzburg v. Hayes*, 408 U.S. 665, 683 (1972); *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936); *Follett v. McCormick*, 321 U.S. 573, 578 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105, 112 (1943).

The cited cases do not address the issue of a general sales tax on newspapers, nor is the nondiscriminatory nature of a tax controlling. To the contrary, the Court said in *Murdock*, "The fact that the ordinance is 'nondiscriminatory' is immaterial." 319 U.S. at 115. *Murdock* invalidated a flat license tax on the exercise of rights protected by the First Amendment, while suggesting that income or property taxation on the person who engages in First Amendment activity would be proper. *Accord, Follett v. McCormick*, 321 U.S. at 577-78; *see Grosjean v. American Press Co.*, 297 U.S. at 245-50 (First Amendment bars "taxes on knowledge" whether imposed as stamp tax on sale of newspapers, or on advertisements; owners of newspapers not otherwise immune from ordinary forms of taxation). Finally, *Branzburg*, in dictum, said "a newspaper may be subjected to nondiscriminatory forms of general taxation," 408 U.S. at 683, *citing Grosjean* and *Murdock*. Not only did *Branzburg* not address the issue of sales taxation, but *Branzburg's* reliance on *Grosjean* and *Murdock* as authority necessarily carries the qualifications described above.

decided such a case involving a sales tax on newspapers.[5] More to the point, this Court has stated clearly that it would not hesitate to invalidate any tax contrary to the intent of the Framers of the First Amendment "on that ground alone." 460 U.S. at 584 n.6.

In *Minneapolis Star*, the Court invalidated a state use tax which singled out for taxation components used in the production of the state's larger newspapers. Components used in other industries were not subject to the use tax and small newspapers were effectively exempted. The Court held that "[d]ifferential taxation of the press" so burdens First Amendment interests that it is permitted only when "the State asserts a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." 460 U.S. at 585 (footnote omitted). The Court based its holding at least in part on the "substantial evidence that differential taxation of the press would have troubled the Framers of the First Amendment." *Id.* at 583 (footnote omitted). While any fair reading of the historical materials supports the Court's conclusion, it does not follow that the Framers were concerned only with, or even primarily with, differential taxation of the press. Likewise, the simple truth that business regulations of general applicability are usually less threatening to First Amendment interests than discriminatory taxes does not mean the Framers believed any or all nondiscriminatory taxes could be levied on the press.

In fact, the historical evidence reveals the Framers intended the First Amendment to bar more than mere discrimination in taxation. It shows the Framers would have found at least equally troubling any application of a general

[5] The Court has on several occasions dismissed appeals from state courts upholding state taxes on the *gross receipts* of businesses which did not exempt authors or newspapers from the tax. *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170, *appeal dismissed*, 358 U.S. 39 (1958) (but newspapers exempted); *Tampa Times Co. v. Tampa*, 158 Fla. 589, 29 So.2d 368, *appeal dismissed*, 332 U.S. 749 (1947) (but legislatively overruled); *Giragi v. Moore*, 64 P.2d 819 (Ariz.) (on rehearing), *appeal dismissed*, 301 U.S. 670 (1937) (gross receipts tax, not sales). Although such decisions have some precedential weight, they are not of the same force as an opinion of the Court addressing the merits of the question. *Tully v. Griffin, Inc.*, 429 U.S. 68, 74-75 (1976); *Edelman v. Jordan*, 415 U.S. 651, 671 (1974). That no such holding was required in deciding the *Minneapolis Star* case is shown *infra* at 6-7 & n.6.

sales tax to newspapers. The state sales tax, as applied to newspapers, is the contemporary analogue of the odious eighteenth-century stamp taxes, or "knowledge taxes." These taxes imposed a duty on newspapers and other goods at the point of retail sale. They were opposed not only because they were intended to suppress expression or because they singled out the press for discrimination. Indeed, the Stamp Act of 1765 did neither; it was a revenue-raising tax of broad applicability. Even the first Stamp Act applied to goods other than newspapers and served revenue-raising, as well as other, purposes. In part, these Acts were opposed simply because they taxed the sale of newspapers to the public. A general sales tax on newspapers is unconstitutional because it, like the Stamp Act taxes, is precisely the type of "knowledge tax" the Framers intended the First Amendment to preclude.

The Framers' opposition to direct taxes on newspaper sales is complex and historically rooted in their deep antipathy toward the English knowledge taxes. Their posture is not reducible to simple abstract principles, but it may in part be attributable to the combination of characteristics unique to such taxes which the Framers believed rendered them too dangerous to trust government to fairly administer.

The Framers feared the Stamp Acts because they directly taxed the exercise of a fundamental right, the dissemination and acquisition of knowledge. The Framers believed that just as government may not tax prayers or speeches, it may not tax the dissemination or acquisition of news. This is, in fact, the central meaning of several of this Court's more venerable First Amendment decisions. *See, e.g., Follett v. McCormick*, 321 U.S. 573 (1944).

The Framers recognized the Stamp Acts were unrelated to the profitability of the newspapers to which they applied. Since the tax had to be paid even when a publisher made no money, the effect on a marginally profitable publication was to put it out of business. This was indeed the effect of the infamous Stamp Acts, and the Framers well knew it. They believed government should not be granted the power to levy such taxes because their consequence was an evil irrespective of their intent.

The Framers also feared stamp taxes on the press because, in the English experience, they often served to place newspapers beyond the means of the poor. Whether they discriminated or not, flat taxes on the acquisition of news kept newspapers out of the hands of the English lower classes. The Framers intended to give the government no such power.

By the time the First Amendment was adopted, no state imposed a tax on the sale of newspapers. Both Massachusetts and New York, the only states to place taxes on newspapers, had repealed them. This Court should adhere to the intent of the Framers of the First Amendment by declaring that the exemption of the press from sales taxation is constitutionally required.

ARGUMENT

I. The Imposition Of Any Sales Tax On The Press Would Be Contrary To The Intent Of The Framers Of The First Amendment

There can be no doubt, and the *amici* express none, that "the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." 460 U.S. at 581 (citations omitted). But it is equally established that when this Court does "have evidence that a particular law would have offended the Framers, we have not hesitated to invalidate it on that ground alone." *Id.* at 584 n.6. It is the burden of this brief to show that the Framers of the First Amendment disapproved of the imposition of taxes on newspapers at the point of sale.

That this historical conclusion can be generally harmonized with the Court's prior teachings on the matter, and is certainly not foreclosed by them, can be shown by a careful reading of the relevant cases. This Court has noted "differential taxation of the press would have troubled the Framers of the First Amendment," 460 U.S. at 583 (footnote omitted), but it has never stated that *only* differential taxation would have offended them or that a general tax of any kind applied to the press would have received their approval. And, although the

Court has suggested that a generally applicable tax presents "little cause for concern" because government will not "destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency," 460 U.S. at 585 (citation omitted), it has not held that general taxes are never cause for concern. It is therefore entirely consistent with this Court's historical understanding and holdings that the Framers were vigorously opposed to any taxation of the press at the point of sale, discriminatory or otherwise.[6]

A. The Framers Intended to Preclude Taxation Of The Press Imposed At The Point Of Sale

This Court has observed that "[w]hen the Constitution was proposed without an explicit guarantee of freedom of the press, the Antifederalists objected." 460 U.S. at 584. The Federalists argued "that such a guarantee was unnecessary because the Constitution granted Congress no power to control the press." *Id.* The Antifederalists responded that without express protection for the press, the "necessary and proper" clause in combination with the taxing power could be used to abridge its freedom in much the way that power had been used in England. 3 J. Elliot (ed.), *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 441-42 (George Mason); J. Main, *The Antifederalists* 154-55 (1961)

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[6] In reaching its decision in *Minneapolis Star* this Court held only that a differential tax on the press must be justified by an overriding state interest and that the Minnesota tax also was invalid because it discriminated against certain members of the press. The case did not involve the constitutionality of any sales tax, and neither of these holdings requires any finding that sales taxes of general applicability need not exempt newspapers. It may be objected that the Court did opine that Minnesota had an available alternative to differential taxation of the press, in that "the State could raise the revenue by taxing businesses generally . . . ." *Id.* at 586 (footnote omitted). But a general tax need not be a sales tax. And the Court found two "fatal flaws" in Minnesota's claim that its use tax was a "substitute" for its sales tax. *Id.* at 587. First, Minnesota offered no explanation of why it imposed the use tax instead of the sales tax and since the tax fell on components and not ultimate sales, it probably was not a substitute for the sales tax. *Id.* at 588. Second, "courts as institutions are poorly equipped to evaluate with precision the relative burdens of various methods of taxation," so the courts could not administer a rule allowing differential taxation of the press even if the burden would be the same or less as that imposed by other taxes on other taxpayers. *Id.* at 589 (footnote omitted).

(quoting "Timoleon" in *N.Y. Journal*, Nov. 1, 1787); Lee, "Letters from the Federal Farmer" IV, in H. Storing (ed.), *The Antifederalist* 59 (1985). As the Court noted in *Minneapolis Star*, "[t]he concerns voiced by the Antifederalists led to the adoption of the Bill of Rights." 460 U.S. at 584 (citation omitted). Because the "framers of the First Amendment were familiar with the English struggle," *Grosjean v. American Press Co.*, 297 U.S. 233, 248 (1936), it is necessary to view the Antifederalists' position against the backdrop of the English experience with the infamous Stamp Acts or "knowledge taxes" to understand precisely their "concerns."

1. The Infamous English Stamp Acts Were General Revenue-Raising Measures Which Taxed Newspapers And Other Goods At The Point of Sale

By the end of the seventeenth century, as the popular demand for easily accessible information grew, the English Crown found it propitious to develop more subtle means to retain some control of the press. Public sentiment began to play a greater role in the conduct of governmental affairs, especially as competing factions of power sought public support for their respective positions. Laws which created and supported the licensing system were regarded as ineffective and unworkable and by 1694 were allowed to lapse. F. Siebert, *Freedom of the Press in England, 1476-1776*, 244, 305-06 (1952).

Despite the fact that the value of a free press was acknowledged by prominent government officials at the turn of the century, publications which commented on political affairs were still viewed with suspicion by government regulators. F. Siebert, *supra*, at 305-06. It was in this light that Parliament first considered taxing the press in order to regulate printed matter indirectly. F. Siebert, *supra*, at 306-10; 1 C. D. Collett, *History of the Taxes on Knowledge* 7 (1899). Parliament had just passed its first tax on printed matter (calendars and almanacs) in 1710, and in 1711 a report had circulated suggesting that taxation of "weekly newspapers and pamphlets . . . would probably reduce the circulation of newspapers from 45,000 to not above 30,000." F. Siebert, *supra*, at 309 (footnote omitted). On January 17, 1712, at the request of the

Ecclesiastical Convocation, Queen Anne addressed Parliament and deplored the

> great license . . . taken in publishing false and scandalous Libels such as are a reproach to any government. This Evil seems too strong for the Laws now in force; it is therefore recommended to you to find a Remedy equal to the Mischief.

F. Siebert, *supra*, at 309; C. D. Collett, *supra*, at 8.

But suppression was not the only purpose of the tax. Of at least equal concern to the Crown was the need to raise money to fight the War of the Spanish Succession. Stewart, *John Lennox and The Greenock Newsclout: A Fight Against the Taxes on Knowledge*, 15 Scot. Hist. Rev. 322, 326-27 (1918); J. B. Williams, *History of English Journalism* (1908); F. Siebert, *supra*, at 309. The newspaper stamp duty and the special tax on advertising in England "were a part of ordinary revenue measures; the position of the government was that the press, as a business, should pay its fair share of taxes." J. Gerald, *The British Press Under Government Economic Controls* 6 (1956).

Parliament responded on May 16, 1712 by passing the first general revenue tax which included a tax on newspapers. This enactment (10 Anne, c. 19), known as the Stamp Act of 1712, placed a tax on imported linen; soaps; several kinds of agreements written on vellum, parchment, or paper; and printed papers, pamphlets, and advertisements. The Act earned its name because it required a stamp to be affixed on all documents, including newspapers at the point of sale. C. D. Collett, *supra*, at 8. The law also provided certain "exemptions" or "discounts". For example, there was a one-third "drawback" on soap used in making clothes or serges, since the wool industry had had a long history of favorable treatment by the government. There was also a "drawback" for paper used by the universities at Oxford and Cambridge and in Scotland, as well as for any books printed in Latin, Greek, Oriental, or Northern languages for the "encouragement of learning." C. D. Collett, *supra*, at 8-9. Thus, the early Stamp Act was directly

analogous to the broad contemporary sales tax, even including a disparate array of exemptions.[7]

Whatever the intent of the English stamp tax, its effects were clear. The immediate consequence of the Stamp Act was the demise of several newspapers. F. Siebert, *supra*, at 312. As Sir Richard Steele, editor of the *Spectator* explained the day before the Stamp Tax went into effect: "This is the day on which many eminent authors will publish their last words." C. D. Collett, *supra*, at 12. The tax likewise retarded the establishment of mass-circulation newspapers. *Id.* at 5-6; Stewart, *supra*, at 326.

Parliament passed a second Stamp Tax Act in March 1765. This Act taxed legal documents (including contracts, court pleas, land grants, college diplomas, and liquor licenses), publications and advertisements, and gambling items (dice and playing cards). The stated purpose of the law was to defray "the expense of defending, protecting, and securing" the colonies. This purpose was real. A large public debt had been incurred during the Seven Years War, and the Stamp Act was only one of several measures designed to increase British revenues. C. Miller, *The Supreme Court and the Uses of History* 76 (1969).

2. The American Colonies Vehemently Opposed The Newspaper Tax Included in The Stamp Act of 1765

The Stamp Act of 1765 so outraged the colonists that Parliament repealed it within a year. In passing this Stamp Act, Prime Minister George Grenville had touched "each nerve center in American life at which either economic or intellectual activity was registered." J. Pole, *Foundations of American Independence, 1763-1815* 42 (1973). "No group in America

[7] The contemporary form taken by state sales taxes is of relatively recent vintage; the first modern sales tax law was enacted by West Virginia in 1921, followed by Georgia in 1929. Morgan, *Retail Sales Tax* 3 (1964). Today some 45 states have a sales tax; only Alaska, Delaware, Montana, New Hampshire, and Oregon do not. St. Tax Guide (CCH) ¶ 60-000 at p. 6021 fn. In general, these sales taxes are peppered with exemptions which serve a variety of purposes—from ameliorating the regressive character of the tax to placating special interest groups. C. Oster, *State Retail Sales Taxation* 114 (1957).

was more directly affected than the publishers of the twenty-four newspapers in the mainland colonies." M. Jensen, *The Founding of a Nation* 126 (1968). Benjamin Franklin, who was serving as a colonial agent in London when the Stamp Act was adopted, wrote to America, "I think it will affect the Printers more than anybody . . . as a Sterling Halfpenny Stamp on every Half Sheet of a Newspaper, and Two shillings Sterling on every Advertisement, will go near to knock up one Half of both." Botein, "Printers and the American Revolution," in *The Press and the American Revolution* 11, 23 (B. Bailyn & J. Hench, eds., 1980). Foreign-language publications had to pay twice the normal rates, a severe blow to the German-language press around Philadelphia, leading Henrich Miller, a German-language publisher, to call the Stamp Act "the most unconstitutional law imaginable." Schlesinger, *The Colonial Newspapers and the Stamp Act*, 8 N.E.Q. 66, 70 (1935).

Some newspapers set off their columns with heavy black mourning margins the day before the tax went into effect, while others printed silhouetted skulls and crossed bones to symbolize a dead free press. J. Lofton, *The Press as Guardian of the First Amendment* 2 (1980); M. Jensen, *supra*, at 127. The New Hampshire Gazette represented itself as gasping, "*I must Die*, or submit to that which is *worse* than Death, *be Stamped*, and lose my Freedom." Schlesinger, *supra*, at 74 (emphasis in original). Many publishers defied the law, printing their newspapers on unstamped paper. In New York, Holt's Gazette added to its title the motto, "The United Voice of all His Majesty's *free* and *loyal* Subjects in America—LIBERTY, PROPERTY and *no* STAMPS." *Id.* at 75 (emphasis in original).

"The newspapers played a tremendous role in political life from the Stamp Act onward." M. Jensen, *supra*, at 127. Newspapers reprinted liberally from each other, thus helping to unite the colonies. They appealed to the masses, stirred their emotions and urged them to action. *Id.* at 128. When stamped copies of newspapers from Barbados and Nova Scotia were found in Philadelphia, they were publicly burned. Schlesinger, *supra*, at 79 n.33. Thus the British themselves helped to make the American press an instrument of revolution. J. Lofton, *supra*, at 2; J. Pole, *supra*, at 423.

In 1765, an assembly of delegates from nine of the colonies met as the "Stamp Act Congress" to protest the tax. A formal complaint was issued, entitled "A Declaration of Rights and Grievances," the basic principles of which were later incorporated into the Declaration of Independence. Because of this opposition, the American stamp tax was repealed less than a year after its enactment. Z. Chafee, *Free Speech in the United States* 321 (1967). In 1787, a leading Antifederalist, Samuel Bryan, wrote in the Philadelphia Independent Gazette and Freeman's Journal that "[i]t was not the mere amount of *the duty on stamps,* or *tea* that America opposed. they were considered as signals of approaching despotism, as precedents whereon the superstructure of arbitrary sway was to be reared." 2 H. Storing (ed.), *The Complete Antifederalist* 176-77 (1981) (emphasis in original).

3. The American Colonies So Opposed Taxes on Newspaper Sales That They Repealed All Such Duties By The Time The Bill of Rights Was Enacted

The English were surprised by the colonists' reaction to the Stamp Act of 1765, but the history of precursor taxes in both New York and Massachusetts foreshadowed the reception awaiting the tax. In New York, a tax was imposed on paper in 1756. It met with strong opposition which led to its demise in 1760. L. Levy, *Judgments: Essays on American Constitutional History* 128 (1972). James Parker, printer of the New York *Gazette,* called the tax "like to a killing Frost," and complained in particular that New York's stamp tax disadvantaged him in competition with printers in nearby colonies. Thompson, *Massachusetts and New York Stamp Acts,* 26 Wm. & Mary Q. 257 (1969); Botein, *supra,* at 24.

In Massachusetts, a halfpenny newspaper tax was passed in 1755. As a result of this tax, one newspaper discontinued publication, while another voiced its opposition to the tax by printing articles on the freedom of the press extracted from contemporary London newspapers. C. Duniway, *The Development of Freedom of the Press in Massachusetts* 120 (1906).

By 1780, after the Declaration of Independence, nine of the newly-formed state governments included specific press clauses in their state constitutions. By the time the Constitution was ratified, every state guaranteed the freedom of the press. These clauses were couched in terms similar to the eventual wording of the First Amendment to the Constitution. C. Duniway, *supra,* at 132-36. Nevertheless, in 1785 and 1786, Massachusetts enacted taxes on both newspaper sales and advertisements. Opposition to these measures was explicitly based on the view that the taxes violated the guarantee of the liberty of the press in the Massachusetts constitution:

> A series of articles in the *Massachusetts Centinel* for April and May, 1785, are typical of the feeling against the tax. It was denounced as "the first Stone in the fabrick of Tyranny"; if the principle of such a tax were once admitted, it might be made prohibitory by a venal House of Representatives and thus "end the liberty of the press." It was contrary to the constitution, because it was a stab at the freedom of the press, and "whatever tends in the smallest degree to deprive the people of political information, is inimical to the principles of Republicanism."

C. Duniway, *supra,* at 136 n.2. This is further evidenced by contemporary articles in the *Boston Gazette:*

> The sixteenth article on our Bill of Rights says: "The Liberty of the Press is essential to the security of Freedom in a State: It ought not therefore to be restrained in this commonwealth."
>
> * * *
>
> The duty on advertisements also prevents our publishing that we have lately reprinted an excellent moral Discourse, entitled "the Shortness and Affliction of Human Life illustrated" . . . .

F. Hudson, *Journalism in the United States* 164 (1873).

As a result of this opposition, the taxes on newspapers and advertisements were repealed by 1788. At the time the Bill of Rights was adopted, no state thought it proper to impose a sales tax on newspapers, and none did.

4. The Debates Over The Ratification Of The Constitution Demonstrate The Framers Did Not Intend Government To Levy Sales Taxes On Newspapers

The Constitution originally contained no Bill of Rights and no guarantee of the liberty of the press. At the Constitutional Convention, the Federalists had successfully argued that none was necessary.[8] The immediate public reaction to the proposed Constitution, however, proved them wrong. The greatest single objection to the new Constitution was the lack of any explicit protection for individual rights, and specifically the liberty of the press. J. Main, *supra,* at 255; R. Rutland, *The Birth of the Bill of Rights* 218 (1955); H. Storing, *What the Antifederalists Were For* 64 (1981). The debate between the Antifederalists and the Federalists over the ratification of the Constitution centered on this objection. Antifederalists argued that without an explicit guarantee, the power to tax for the "general welfare" could be perverted and used to restrict the press. *E.g.,* 3 J. Elliot, *supra,* at 441-42 (George Mason); J. Main, *supra,* at 154-55 (quoting "Timoleon" in *N.Y. Journal,* Nov. 1, 1787). They further argued that because the power to tax was not limited, it would extend to everything, including the press, unless a guarantee of press freedom was added. *E.g.,* Lee, "Letters from the Federal Farmer" IV, XVI, in H. Storing (ed.), *The Antifederalist* 49, 85-86; 4 H. Storing (ed.), *The Complete Antifederalist* 206-07 (Thomas Cogswell). The Antifederalists explicitly stated that a Bill of Rights was needed to prevent the government from imposing stamp taxes on newspapers. As one pamphleteer wrote:

> Congress have power to lay all duties of whatever kind, and although they could not *perhaps* directly bar the freedom of the Press, yet they can do it in the exercise of the powers that are expressly decreed to them. Remember

[8] Late in the Convention, Elbridge Gerry and Charles Pinckney moved that a clause be added to the proposed constitution guaranteeing "that the liberty of the Press should be inviolably observed—." 2 M. Farrand (ed.), *The Records of the Federal Convention* 617 (Madison). Roger Sherman responded, "It is unnecessary—The Power of Congress does not extend to the Press," and the motion was voted down 6-5. *Id.* at 618. *See* M. Farrand, *The Framing of the Constitution of the United States* 124 (1913).

> there are such things as *stamp duties* and that these will as effectually abolish the freedom of the press as any express declaration.

3 H. Storing (ed.), *The Complete Antifederalist* 81-82 (emphasis in original). The Federalists argued primarily that no guarantee of the liberty of the press was necessary because nothing in the Constitution gave Congress the power to tax the press. *E.g.,* 2 J. Elliot, *supra,* at 435-36, 453-54 (James Wilson); 3 J. Elliot, *supra,* at 469 (Edmund Randolph); 4 J. Elliot, *supra,* at 208-09 (Richard Spaight).

In the end, the Antifederalists prevailed. The Constitution was ratified, but only on the understanding that a Bill of Rights, including a guarantee of the liberty of the press, would follow immediately. An analysis of the arguments of the prevailing parties—the Antifederalists—is therefore essential to an understanding of the intent of the Framers of the First Amendment. 460 U.S. at 584-85.

The Antifederalists were concerned that the proposed Constitution could be abused by the new federal government and employed against the press. Richard Henry Lee, one of the most widely read and respected of the Antifederalists, wrote in his "Letters From the Federal Farmer" of the danger to the press posed by the taxing power. Lee feared that, in the absence of an explicit constitutional guarantee, Congress could properly consider itself free to employ the taxing power against the press, just as it would against any other industry. And, because of the supremacy clause, state constitutional guarantees would be powerless to bar federal taxation of the press:

> Should the printer say, the freedom of the press was secured by the constitution of the State in which he lived, congress might, and perhaps, with great propriety, answer, that . . . in exercising the powers assigned them, and in making laws to carry them into execution Congress are restrained by nothing beside the federal constitution.

Lee, "Letters From the Federal Farmer" IV, in H. Storing (ed.), *The Antifederalist* 59.

Lee expanded on this argument in Federal Farmer XVI. He initially noted the widespread belief that the freedom of the press "ought not to be restrained by any taxes." Then he warned the press is provided no protection by the fact that the Constitution does not expressly give the Congress the power to tax it. The danger, Lee notes, is that the power to tax is unlimited:

> But, say the advocates, all powers not given are reserved:—true; but the great question is, are not powers given, in the exercise of which this right may be destroyed? .... [T]he question is, what laws will congress have a right to make by the constitution of the union, and particularly touching the press? By art. I, sect. 8, congress will have the power to lay and collect taxes, duties, imposts and excise. *By this congress will clearly have power to lay and collect all kind of taxes whatever*—taxes on houses, lands, polls, industry, merchandize, &c.—taxes on deeds, bonds, and all written instruments—on writs, pleas, and all judicial proceedings, on licenses, naval officers papers. &c. *on newspapers, advertisements, &c.... Printing, like all other businesses, must cease when taxed beyond its profits; and it appears to me, that a power to tax the press at discretion, is a power to destroy or restrain the freedom of it.*

Lee, "Letters From the Federal Farmer" XVI, in H. Storing (ed.), *The Antifederalist* 85-86 (emphasis added).

Lee's fear regarding the taxing power and the press was voiced by many Antifederalists. In New York, Melancton Smith explained why the Constitution needed a press clause: "We contend, that by the indefinite powers granted to the gereral government, the liberty of the press may be restricted by duties, &c. and therefore the constitution ought to have stipulated for its freedom." 1 B. Schwartz (ed.), *The Bill of Rights: A Documentary History* 576 (1971).

The Antifederalists did not distinguish between taxes levied specifically on the press for purposes of suppression and general taxation of the press. A constitutional guarantee of the freedom of the press was understood to bar both equally. Thus,

in Federal Farmer IV, Lee notes that, without an explicit guarantee, Congress would be free both to lay "any duties whatever on printing" *and* to lay "duties particularly heavy on certain pieces printed." Likewise in Federal Farmer XVI, Lee explains that left unrestricted the taxing power will reach "newspapers [and] advertisements," just as it does "industry [and] merchandize." In the minds of the Antifederalists, a guarantee of the liberty of the press was essential to stop Congress from laying *any* duties at the point of sale on the press.

The important lesson taught by the history of the Framers' opposition to the stamp taxes is they were deeply offended by any tax on the sale of newspapers to the general public. Even where stamp taxes were enacted for revenue-raising purposes and had a broad applicability, they were anathema to the Framers. An important purpose of the First Amendment was to ban taxation of the press at the point of sale, which necessarily precludes imposition of a general sales tax. It follows that the exemption sought by the Arkansas Writers Project must be granted.

B. The Framers Intended the First Amendment to Bar Any Tax Which Acted as a "Knowledge Tax" Because They Considered The Potential for Abusive Consequences Too Great

The unrelenting antipathy of the Framers toward any tax on knowledge, whether in the form of the Stamp Act of the colonial era or the contemporary sales tax on newspapers, reflects most profoundly the Framers' reading of English and colonial history and the socio-political world of eighteenth century America. The complexity of the Framers' rationale does not lend itself to any reductionist explanation, but several powerful themes run through the Framers' writings on those matters which help in part to explain their view.

First, the Stamp Act, like the sales tax, directly burdened the exercise of a right: the acquisition of news and information. As New Hampshire Chief Justice Thomas Cogswell, wrote:

> The liberty of the Press is essential to a free people, it ought therefore to be inviolably preserved and secured in

> the Bill of Rights, and no duty or tax to be imposed thereon, of what name or nature soever.

4 H. Storing (ed.), *The Complete Antifederalist* 206-07. Similarly Lee, in his "Letters from the Federal Farmer" noted:

> All parties apparently agree, that the freedom of the press is a fundamental right, and ought not to be restrained by any taxes, duties, or in any manner whatever.

Lee, "Letters From the Federal Farmer" XVI, in H. Storing (ed.), *The Antifederalist* 85.

This Court has long recognized the danger of allowing states to tax the exercise of constitutional rights. *Follett v. McCormick*, 321 U.S. at 578 (no requirement "to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege"); *Murdock v. Pennsylvania*, 315 U.S. 105, 113 (1943) ("A state may not impose a charge for the enjoyment of a right granted by the federal constitution.").[9]

Second, the Framers were deeply concerned by the fact that the stamp tax (like the sales taxes) imposed a burden on newspapers unrelated to their profitability. Richard Henry Lee expressed this fear most clearly: "Printing, like all other busi-

[9] In *Minneapolis Star*, the Court suggested in dicta that *Breard v. Alexandria*, 341 U.S. 622 (1951), "substantially undercut" this line of cases which began with *Martin v. Struthers*, 319 U.S. 141 (1943), 460 U.S. at 586 n.9. But neither *Martin* nor *Breard* addressed the question of whether a direct tax may be placed on the exercise of a right since neither involved taxation. The *Beard* decision held only that any First Amendment interest in soliciting periodical subscriptions door-to-door at private homes, in the absence of an invitation from the homeowner, must give way to the privacy rights of the homeowner. That *Breard* did not disturb *Murdock* and *Follett* regarding the rule of law prohibiting direct taxation of rights is evident from the restatement of that position by the Court in the term immediately following the *Breard* decision. *Memphis Steam Laundry Cleaner, Inc. v. Stone*, 342 U.S. 389 (1952).

Whether *Breard* itself remains good law in any respect is open to serious doubt. *Compare Breard with Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 632 n.7 (1980) ("To the extent that any of the Court's past decisions discussed in Part II [including *Beard*] hold or indicate that commercial speech is excluded from First Amendment protection, those decisions, to that extent, are no longer good law.").

> nesses, must cease when taxed beyond its profits." Lee, "Letters From the Federal Farmer" XVI, in H. Storing (ed.), *The Antifederalist* 85-86 (emphasis added).

The Framers knew that marginally profitable newspapers, whether large or small, often did not survive a tax imposed at the point of sale. They knew this because the English and Massachusetts experience demonstrated it. As Professor Siebert starkly observed: "A sizable number of newspapers were immediately killed by the Act." F. Siebert, *supra*, at 312. Jonathan Swift noted the draconian effect of the Stamp Act on the English "penny press" with typical, yet telling, hyperbole:

> Do you know that all Grub-street is dead and gone last week? . . . [N]ow every single half-sheet pays a halfpenny to the queen. The *Observator* is fallen; the *Medleys* are jumbled together with the *Flying Post;* the *Examiner* is deadly sick; the *Spectator* keeps up and doubles its price.

Id. at 313. Because they knew the potential danger of direct sales taxes to economically weak publications, the Framers greatly feared them. It was no solace to them that a sales tax which applied to a variety of goods would drive marginally profitable non-press companies out of business as effectively as it killed the profitless members of the press.

Third, perhaps the Framers' greatest concern was the effect of a stamp tax on newspaper sales, particularly the less affluent populace. They understood that the English Crown had used such taxes to place acquisition of the news beyond the reach of many members of the public. As noted above, the intent of the first stamp tax was in part to reduce newspaper circulation by one-third. F. Seibert, *supra*, at 308-09. The primary victims of the tax were the inexpensive publications which had formerly circulated widely among the general public:

> Was there no way by which, without the necessity of constant contention, private men might be prevented from using the Press to make their opinions public? The pamphleteers were not rich, but they were often persons of

> education, and not penniless. When only a few copies of their writings were wanted they could pay for them, but now that reading was become more common, and that great numbers of copies were printed, the cost had, to a great extent, to be paid by the readers. If these sheets could be taxed their distribution might become difficult, and when any one attempted to evade the tax he could be punished, not as a libeller, but as a smuggler, and the character of what was printed would not come under discussion, as it generally would in a trial for libel.

C.D. Collett, *supra*, at 7.[10]

Whether these concerns of the Framers retain all of their vitality today is beyond the issue and the record of this case. It is enough that a law imposing taxes on the retail sale of newspapers "would have offended the Framers"; the Court should not "[hesitate] to invalidate it on that ground alone." 460 U.S. at 584 n. 6.

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[10] "Cheapness and expansion were evidently becoming the characteristics of the periodical press; to which every tax, however light, was an impediment. Hence a new movement for the repeal of all 'Taxes on knowledge' led by Mr. Milner Gibson, with admirable ability, address, and persistence. In 1853, the advertisement duty was swept away; and in 1855, the last penny of newspaper stamp was relinquished. Nothing was now left but the duty on paper; and this was assailed with no less vigor. Denounced by penny newspapers, which the repeal of the stamp duty had called into existence; complained of by publishers of cheap books; and deplored by the friends of popular education, it fell, six years later, after a parliamentary contest memorable in history. And now the press was free alike from legal oppression and fiscal impediments." 2 T. May, *Constitutional History of England* 215 (1891).

CONCLUSION

For the reasons stated, the First Amendment precludes imposition of a sales tax on the press. Accordingly, the judgment below should be reversed.

Respectfully submitted,

EDWARD SOTO
COUNSEL OF RECORD
Southeast Financial Center
Suite 4350
Miami, FL 33131-2355
(305) 372-3304

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

v.

CHARLES D. RAGLAND,
COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF OF AMICUS CURIAE THE STATE OF MARYLAND

STEPHEN H. SACHS,
Attorney General of Maryland,
RALPH S. TYLER, III,
Assistant Attorney General,
Counsel of Record,
CARMEN M. SHEPARD,
Special Assistant Attorney General,
The Munsey Building, 2nd Floor,
Seven N. Calvert Street,
Baltimore, Maryland 21202,
(301) 576-6300,
Attorneys for Amicus
State of Maryland.

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On Appeal from the Supreme Court of Arkansas

BRIEF OF AMICUS CURIAE THE STATE OF MARYLAND

Pursuant to United States Supreme Court Rule 36.2, the State of Maryland submits this brief as amicus curiae in support of Appellee, Charles D. Ragland, Commissioner of Revenue of the State of Arkansas. Because

this brief is being sponsored and filed by a State, consent to its filing is not required. Sup. Ct. R. 36.4.

SUMMARY OF ARGUMENT AND INTEREST OF AMICUS CURIAE

The State of Maryland, like most other states, derives substantial revenue from a generally applicable state tax structure which imposes a tax on most retail sales, with only a few narrowly carved exceptions. The state's interest in preserving its tax structure is significant. For example, in the current fiscal year Maryland will receive over a billion dollars in revenues from its state retail sales and use tax and licenses. A significant portion of these revenues is derived from the retail sales tax on publications.

Maryland has granted certain narrow exemptions from the retail sales tax to a limited number of publications because of their unique and important interest to the

citizens. For example, Maryland, like Arkansas, has created an exemption for newspapers. Maryland also grants a general exemption to all sales for or by religious organizations, which includes any publications issued by religious organizations, irrespective of content. In addition, Maryland exempts any publications issued by the State or any of its agencies. As amicus, the State of Maryland wishes to stress the importance of preserving the integrity of its state tax system as well as its ability to carve narrow exemptions for transactions of compelling importance to its citizens.

ARGUMENT

I. State Exercise of Its Taxing Power

A. Importance of Retail Sales Taxes to the States

Retail sales taxes have long served as one of the most important revenue raising devices available to states. Most states, including amicus, have enacted generally appli-

cable sales taxes levied upon retail sales in which there is a transfer of title or possession of tangible personal property.[1] These sales taxes are a necessary supplement to the revenues derived from property and income taxes.[2] Maryland, for example, estimates that the retail sales and use tax and licenses will generate over a billion dollars in revenues in the current fiscal year, nearly a quarter of total State general funds. Budget Message to the General Assembly of Maryland and the Budget in Brief (Jan. 15, 1986).

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[1] Only five States have no retail sales tax or gross receipts tax in effect. See All States Tax Reporter (CCH).

[2] In addition to a retail sales tax, Maryland has enacted an income tax, Md. Code Ann., Revenue and Taxes, Art. 81, §§279 - 323B; use tax, id. at §§372 - 401; gross receipts tax, id. at §§129 - 134; inheritance tax, id. at §§149 - 193; property tax and a few other miscellaneous taxes. See generally, Md. Code Ann., Revenue and Taxes, Art. 81.

A retail sales tax is a very cost-effective method for taxing consumption. One of the advantages of retail sales tax over other methods is that it utilizes the seller as the collector of the tax. Thus, the State is able to reach many transactions where the amount of the tax is relatively small without expending enormous resources.[3]

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[3] In Maryland, for example, the tax on a sale where the price is twenty cents ($.20) is one cent ($.01); where the price is between twenty-one cents ($.21) to forty cents ($.40), it is two cents ($.02); where the price is between forty-one cents ($.41) to sixty cents ($.60), it is three cents ($.03); where the price is between sixty-one cents ($.61) and eighty cents ($.80), it is four cents ($.04); where the price is between eighty-one cents ($.81) to one dollar ($1.00), it is five cents ($.05). Md. Code Ann., Art. 81, §325(a). On any sale where the price exceeds one dollar, the sales tax is five cents ($.05) on each even dollar plus one cent ($.01) for each twenty cents ($.20) or fraction thereof in excess of the even dollars. Id.

B. Responsiveness of State Tax System to Local Needs

In devising their retail sales tax structures, states often exempt certain narrow categories of transactions that affect the special interests and needs of their citizens. For example, Maryland has chosen to exempt certain transactions affecting the fishing, farming and agricultural industry. Id. at §326(h), (v), (y) and (ll). These are industries of particular importance to the State and the exemption assists the local farmers and fishermen to sustain their trade.

Some states reflect their concern with the availability of essential services to their citizens through certain exemptions applicable to transactions involving basic goods and services. In Maryland, transactions involving the sale of water, gas, electricity, and steam provided under state-approved rates; transportation services; and sales to certain qualifying cemeteries are

exempt. Id. at §326(g-2), (n), (o), (jj) and (aaa). Maryland also exempts sales of items which can assist handicapped or ill individuals, such as medicines, many medical devices, and physical aids. Id. at §326(l), (l-1), (m), (yy) and (nn). These exemptions advance the State's interest in assuring the physical well-being of its citizens.

The State of Maryland also exempts certain sales by charitable, educational, veterans' and senior citizen's groups.[4] Most of these groups already are the recipients of State or local government benefits, whether through direct assistance or through tax exempt status. An exemption for them reduces

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4 Sales made by hospital thrift groups, id. at §326(kk); sales to senior citizen organizations receiving government benefits, id. at §326(hh); sales to non-profit religious or educational institutions or organizations or volunteer fire departments or rescue squads, id. at §326(i); sales of food by churches, religious organizations, schools, colleges, and hospitals, id. at §326(b), are all exempt.

the transaction costs of collecting the sales tax and compensating these groups through an increase in other government benefits.

Similarly, publications issued by the State or any of its agencies are exempt from the retail sales tax. Their exemption also avoids the futile and costly exercise of taxing one arm of government to give to another.

In addition, Maryland exempts both sales made to a non-profit religious institution or organization as well as sales by a bonafide church or religious organization when made for the general purpose of the church or religious organization. Id. at §§326(c)(1)(i), (i) and (u). As an incident of this general exemption, publications sold by any such religious organizations are covered by the exemption. Through these exemptions (and others incorporated throughout the State taxing structure) the State remains scrupulously neutral in matters of religion and

preserves its strong interest in the separation of church and state.

As this Court recognized in Walz v. Tax Commission of City of New York, 397 U.S. 664, 90 S.Ct. 1409 (1970), tax exemption for churches and religious organizations has long been the pattern at both the state and federal level:

> All of the states provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches over 75 years - religious organizations have been expressly exempt from the tax.
>
> * * *
>
> Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally as long as none was favored over others and none suffered interference.

397 U.S. at 677, 90 S.Ct. at 1415.

(Footnotes omitted). The interest of the state in preserving this type of tax exemption is grounded in two secular purposes. First, these religious and church organizations "contribute to the well-being of the community in a variety of non-religious ways," 397 U.S. at 687 (Brennan, J. concurring), and thereby lessen the load that would have to be borne out of state revenues. In addition, these organizations contribute uniquely "to the pluralism of American society by their religious activities." Id. at 689. For these reasons, the State's grant of tax exemption to religious organizations and churches does not violate the First Amendment.

Finally, most states, including Arkansas and Maryland, exempt newspapers from generally applicable retail sales taxes. These exemptions recognize the special historical role that newspapers have played in the

dissemination of information in the United States, as well as their current importance as one of the most accessible and timely sources of information.

The exemption for newspapers reflects a long history in the United States of safeguarding the freedom of the press. Historically, newspapers served a unique role in the dissemination of information and the enhancement of uninhibited robust public debate. Because of their comparatively modest price, they are the publications with the largest circulation among all classes of citizens. Further, because most newspapers typically are available with greater frequency than other publications, they promote timely public debate.

Newspapers were the primary focus of the early English taxes on publications. Publications in other forms, such as books, largely escaped the original English taxes. The

principal objective of the English government was the suppression of small, cheap publications that were available to the poorer classes. F. Siebert, Freedom of the Press in England 1476 - 1765 311 (1952).

Taxation as an instrument for control of the press first appeared in the United States with the Stamp Act of 1765, which taxed paper used for newspapers and other publications. Although the Colonists were outraged at all the provisions of The Stamp Act of 1765, the indignation of the colonists focused on its effects on newspapers. "No group in America was more directly affected than the publishers of the twenty-four newspapers in the mainland colonies." M. Jensen, The Founding of a Nation 126 (1968); see also, Botein, Printers and the American Revolution, in B. Bailyn & J. Hench (eds.), The Press & the American Revolution 11, 23 (1980).

Newspapers also led the public outcry against the Stamp Tax. "From the very first acts of resistance to the end of the Revolution, newspapers were in the forefront of the ideological struggle that led to independence." Id.

The newspapers, "far more than most pamphlets, appealed to the mass of people, to the masses, stirred their emotions and urged them to action." Id. at 128. Newspapers "expounded political ideas in language that made most pamphlets and formal legislative resolutions look stuffy, indeed." Id. Thus, American newspapers became a leading instrument of the struggle for independence:

> The Stamp Act crisis brought colonial newspapers to the very head of the protest movement. Newspapers abandoned their politeness and became the chief means of formulating public opinion and of stating far more radical ideas than most legislatures were willing to adopt. Newspaper writers, taking the names of the dead of history, expounded doctrines they would

> never have dared express in a public forum. It was they who raised for the first time . . . the idea that independence might be the ultimate outcome of the quarrel with Britain.

Jensen, supra, at 99; see also, J. Lofton, The Press as Guardian of the First Amendment 2 (1980). It was the newspapers' accessibility to the masses that enabled them to attain a special regard by the public:

> However little some may think of common News-Papers . . . to a wise man they appear the Ark of God, for the Safety of the People. Their fullness of general entertainment, small Bulk and Price, recommend them to everyone, and . . . awaken the Minds of many to a solid inquiry of interests they would otherwise not dream of.

Schlesinger, Prelude to Independence 82-83 (1958).

The public dislike for taxes on newspapers was reflected in many states. The few states, such as Massachusetts and New York, which attempted to levy taxes on

them were unable to maintain them for long. See Thompson, Massachusetts and New York Stamp Acts, 26 Wm. & Mary Q. 253, 257 (1969); C. Duniway, Freedom of the Press in Massachusetts 136 (1969).

This concern with the untrameled access to newspapers fueled the drafting of the First Amendment protections. This concern is now reflected in the fact that the vast majority of states exempt newspapers from retail sales taxes.[5]

In sum, the retail sales tax is an important revenue raising device to the states. Equally important to the states is the sales tax's flexibility to accomodate narrow categories of transactions of compelling importance to the states.

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[5] Only eight (8) states levy a tax on sales of newspapers to consumers. See All States Sales Tax Reporter (CCH) ¶7-275.

II. States May Subject Publications to Generally Applicable Economic Regulation

The First Amendment does not prohibit all regulation of publications. It is beyond dispute that the States can subject newspapers and other publications "to generally applicable economic regulation without creating constitutional problems." Minneapolis Star & Tribune v. Minnesota Commissioner of Revenue, 460 U.S. 575, 581, 103 S.Ct. 1365, 1369 (1983). "As the press has business aspects it has no special immunity from laws applicable to business in general." Mabee v. White Plains Publishing Co., 327 U.S. 178, 184, 66 S.Ct. 511, 514 (1946).

A generally applicable sales tax is precisely the type of general economic regulation that is constitutionally permissible. Minneapolis Star, 460 U.S. at 586 n.9, 103 S. Ct. at 1372 n. 9. Although all taxes impose a "burden" on the subject, the First Amendment

"does not invalidate every incidental burdening of the press that may result from the enforcement of . . . civil statutes of general applicability." Branzburg v. Hayes, 408 U.S. 665, 682, 92 S.Ct. 2646, 2657 (1972).

States, therefore, possess the power to assess taxes against sales of books, magazines or newspapers, so long as it results from a generally applicable system. The requirement of general applicability is not, however, a rigid constitutional prescription. Rather, it is derived from the proposition that a government will not "destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." Minneapolis Star, 460 U.S. at 585, 103 S.Ct. at 1371. Thus, in Grosjean v. American Press Co., this Court invalidated a license tax which was paid by only a few of the state newspapers with the largest circulation. And later, in

Minneapolis Star, this Court invalidated a "use tax" on the cost of ink and paper, which was paid by only a few of the largest local newspapers. These cases demonstrate that States may not excessively burden publications through the use of a tax system, but they are not prohibited from imposing any burden at all. Absent the singling out of the press for unduly burdensome treatment, the State is free to fashion a tax system that serves its revenue needs and the interests of its citizens.

III. STATES HAVE THE POWER TO ADJUST THEIR TAXING SYSTEMS TO ACCOMODATE LOCAL NEEDS

States have the attribute of sovereign powers in devising their fiscal systems to ensure revenue and foster their local interests. Because the States are uniquely qualified to assess the needs of their citizens, they are also uniquely qualified to adjust their taxing scheme accordingly:

> Traditionally classification has been a device for fitting tax programs for local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures posses the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

Madden v. Kentucky, 309 U.S. 83, 88, 60 S.Ct. 406, 407-408 (1940) (footnotes omitted). Accordingly, classifications devised by State legislatures in response to local needs are entitled to a great deal of deference:

> The State may impose different specific taxes upon different trades and professions and may vary the rate of excise upon various products. It is not required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition or value.

Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527, 79 S.Ct. 437, 440 (1959). See also Minneapolis Star, 460 U.S. at 600, 103 S.Ct. at 1379.

In crafting a system of taxation, the government is not constrained to afford publications every exemption it grants any other group. This issue was decided in Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 66 S.Ct. 494 (1946), in which a publisher challenged the constitutionality of the Fair Labor Standards Act because it excluded seamen and farmworkers, but not employees of newspapers, from its scope.

Oklahoma Press recognized that the power to make rational distinctions among groups is a necessary prerequisite to democratic government. It is an attribute that is as essential for each State government as it is for the Federal government under the Fair Labor Standards Act.

The First Amendment does not itself prohibit differential treatment of persons exercising constitutionally protected rights. Regan v. Taxation with Representation of Washington, 461 U.S. 540, 103 S.Ct. 1977 (1983) (preferential tax treatment for lobbying by veterans); Mabee v. White Plains Publishing Co., 327 U.S. 178, 66 S.Ct. 511 (1946) (exemption for small weekly and semi-weekly newspapers from Fair Labor Standards Act); cf. Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612, 672 (1976) ("[T]he Constitution does not require Congress to treat all declared candidates the same for public financing purposes."). The interest of the First Amendment is to prohibit the abridgement of these rights. Accordingly, State regulation of protected activities is prohibited only where it has the consequence of unduly curtailing First Amendment freedoms. Cf. Minneapolis Star & Tribune, 460 U.S. at 600,

103 S.Ct. at 1376 ("But there is no infringement, and thus the Court has never required more [than a rational basis], unless the State's classifications significantly burden these specially protected rights.") (Rehnquist, J. dissenting) (emphasis in original). Thus, the focus of the inquiry into State taxation is whether the State tax classification system unduly curtails protected activity, not whether it burdens it at all:

> Statutes imposing taxes upon rather than prohibiting particular activity have been struck down when perceived to have the consequence of unduly curtailing the liberty of freedom of press assured under the Fourteenth Amendment. Grosjean v. American Press Co., 297 U.S. 233; Murdock v. Pennsylvania, 319 U.S. 105.

NAACP v. Alabama, ex rel. Patterson, 357 U.S. 449, 461 (1958) (emphasis added).

The principle that differential economic regulation is unconstitutional only if it results in undue abridgement is clearly

reflected in Oklahoma Press. Merely because certain specific groups are exempt from economic regulation does not mean that a State must extend similar benefits to publications. Similarly, the State need not forbear from granting the press or some other type of publication a special exemption if it does not grant the broad universe of publications similar treatment. In Minneapolis Star, this Court invalidated a state use tax on the cost of paper and ink products applicable to periodic publications and impacted on those with the largest circulation. Although the State in that case argued that the tax actually favored the press and thus was not constitutionally infirm, the Court found that, because of the differential method utilized, the tax carried with it the threat of more burdensome treatment. Minneapolis Star, 460 U.S. at 590, 103 S.Ct. at 1374. Nevertheless, the opinion indicates that this threat

can be avoided by utilizing the same method but applying a lower rate:

> If a State employed the same method of taxation but applied a lower rate to the press, so that there could be no doubt that the legislature was not singling out the press to bear a more burdensome tax, we would, of course, be in a position to evaluate the relative burdens. And, given the clarity of the relative burdens, as well as the rule that differential methods of taxation are not automatically permissible if less burdensome, a lower tax rate for the press would not raise the threat that the legislature might later impose an extra burden that would escape detection by the courts. . . .

Id. at 590 n.13 (emphasis in original). This is precisely the approach that Arkansas, in common with most States, employs. Retail sales taxes are generally applicable. To the extent they impose an economic burden on publications, they do so generally, in the same manner as does any other economic regulation. No individual publication is singled out for more burdensome treatment than all others.

Where this case differs dramatically from Minneapolis Star is in the State's treatment of newspapers. Whereas Minnesota singled out newspapers for potentially more burdensome treatment, Arkansas, like most other States, affords newspapers quantifiably more favorable treatment. Thus, the exemption afforded by Arkansas to newspapers and a few other types of publications is precisely what this Court has determined constitutes a permissible exercise of a legislature's power.

As shown above, the States have a rational basis for the classifications of publications which they exempt from retail sales tax. Moreover, these classifications correspond to interests of compelling importance to the states. Newspapers in Maryland and most other states are exempt because of their long history of service to the nation. Religious publications are exempt as an

incident of the State policy of exempting all religious institutions from state taxes. Arkansas serves similar domestic concerns by exempting other categories of publications.

CONCLUSION

All States must have the flexibility to afford certain narrow groups or enumerated transactions of particular interest to the State and its citizens differential tax treatment. The fact that a State may desire to grant a particular type of publication an exemption should not also compel it to grant the exemptions to all other publications. So long as the tax is otherwise generally applicable, there is no undue curtailment of First Amendment rights.

The power to make distinctions among transactions to protect compelling local interests is an essential aspect of a State's sovereignty. To deprive the State of this power would destroy its ability to ensure

revenue and foster local interests. Yet the prohibition appellant seeks would achieve just this purpose, for it would seriously interfere with a State's ability to provide any exemption to address a specific local need, whether it be those of farmers, veterans, religious groups or newspapers, if it does not also exempt all publications. To so hold would be to subject the essential taxing power of the State to an intolerable intrusion "hostile to the basic principles of our government." Ohio Oil Co. v. Conway, 281 U.S. 146, 159, 50 S.Ct. 310, 314 (1930).

Respectfully submitted,

STEPHEN H. SACHS,
Attorney General of Maryland,

RALPH S. TYLER, III,
Assistant Attorney General,
Counsel of Record,

CARMEN M. SHEPARD
Special Assistant Attorney
General,

Attorneys for Amicus State of
Maryland

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No. 85-1370

In The
Supreme Court of the United States
October Term, 1985

ARKANSAS WRITERS' PROJECT, INC.,
Appellant,

vs.

CHARLES D. RAGLAND, COMMISSIONER OF REVENUE OF THE STATE OF ARKANSAS,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF ARKANSAS

BRIEF OF THE STATES OF AMERICAN SAMOA, CONNECTICUT, FLORIDA, HAWAII, IDAHO, IOWA, LOUISIANA, MINNESOTA, PENNSYLVANIA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TEXAS, UTAH, AND VERMONT AS AMICI CURIAE IN SUPPORT OF APPELLEE

THOMAS J. MILLER
Attorney General of Iowa
Hoover State Office Building
Des Moines, IA 50319
(515) 281-5164

(Additional List of Counsel on Inside Front Cover)

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

Leulumoega S. Lutu
Attorney General of
American Samoa
P.O. Box 7
Pago Pago, American
Samoa 96799
(684) 633-4163

Joseph Lieberman
Attorney General of
Connecticut
Capitol Annex, 30 Trinity St.
Hartford, Connecticut 06106
(203) 566-2026

Jim Smith
Attorney General of Florida
State Capitol
Tallahassee, Florida 32301
(904) 487-1963

Corinne K. A. Watanabe
Attorney General of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813
(808) 548-4740

Jim Jones
Attorney General of Idaho
State House
Boise, Idaho 83720
(208) 334-2400

William J. Guste, Jr.
Attorney General of Louisiana
2-3-4 Loyola Building
New Orleans, LA 70112
(504) 568-5575

Hubert H. Humphrey, III
Attorney General of Minnesota
515 Transportation Building
St. Paul, Minnesota 55155
(612) 297-2040

Michael Turpen
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, OK 73105
(405) 521-3921

LeRoy S. Zimmerman
Attorney General of
Pennsylvania
Strawberry Square—
16th Floor
Harrisburg, PA 17120
(717) 787-3391

T. Travis Medlock
Attorney General of
South Carolina
Post Office Box 11549
Columbia, SC 29211
(803) 734-3970

Mark V. Meierhenry
Attorney General of
South Dakota
500 E. Capitol
Pierre, South Dakota 57501
(605) 773-3215

Jim Mattox
Attorney General of Texas
Capitol Station, P.O. Box 12548
Austin, Texas 78711
(512) 463-2100

David L. Wilkinson
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 533-4446

Jeffrey L. Amestoy
Attorney General of Vermont
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

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—o—

I. INTRODUCTORY STATEMENT

Pursuant to United States Supreme Court Rule 36.2, the signatory States submit this Brief as *Amici Curiae* in support of the Appellee, Charles D. Ragland, Commissioner of Revenue of the State of Arkansas. Since this Brief is

being sponsored and filed by the aforementioned States, consent to its filing is not required. United States Supreme Court Rule 36.4.

II. OPINIONS BELOW

The Opinions of the Arkansas Supreme Court are reported in 697 S.W.2d 94 (1985) and 698 S.W.2d 802 (1985). The unreported opinion of March 29, 1985, and the Order of April 15, 1985 of the Chancery Court of Pulaski County, Arkansas and the Opinions of the Arkansas Supreme Court are contained in the Appendix attached to Appellant's Jurisdictional Statement.

III. INTEREST OF AMICI CURIAE

The interests of the States joined as Amici in this Brief concern what they believe to be the far reaching effects, raised by the issue in this case, relating to a generally applicable state tax structure which imposes a retail sales tax upon retail sales of most, but not all, types of publications.

Amici strongly believe that a State should not be precluded by First Amendment guarantees from making reasonable choices of publications as subjects for taxation or exemption. A contrary result would straitjacket the States with an iron clad constitutional rule whereby all retail sales of every publication would have to be taxed or would have to be exempt. Since there are clearly different types of publications, such a constitutional rule is unwarranted and

would unjustifiably restrict the States in making their choices of subjects for taxation.

IV. ARGUMENT

Arkansas, in common with most States in the Nation, imposes a generally applicable retail sales tax whereby gross receipts from the retail sales of tangible personal property are taxed. While most retail sales are subject to tax, Arkansas has chosen to exempt certain enumerated transactions. States which impose retail sales taxes generally levy the tax upon all retail sales of tangible personal property and, by specific enumeration, create tax exemptions. In addition, the incidence of the sales tax is usually upon the consumer, and not upon the retail seller. *First Agricultural National Bank of Berkshire County v. State Tax Commission,* 392 U.S. 339, 347-8 (1968).

In its choice of tax exemptions, Arkansas exempted retail sales of newspapers and retail sales of religious, professional, trade and sports publications. Ark. Stat. Ann. § 84-1904(f) and (j). Retail sales of other types of publications, whether in the form of books, magazines, periodicals, advertising, newsletters, tapes, records, pamphlets, or whatever, are subject to tax. Arkansas, thus, imposes its sales tax upon sales of most types of publications in many formats and exempts only a few narrowly selected classes. Most types of magazines are subject to the Arkansas tax.

Other States, such as Iowa, impose their retail sales taxes generally upon retail sales of tangible personal property and create tax exemptions for retail sales of news-

papers, but not for magazines. Iowa Code §§ 422.43(1) and 422.45(9) (1985). These States also tax sales of most other types of publications.

Appellant's and its amici's argument is that a State must exempt from its retail sales tax the retail sales of publications, such as Appellant's magazine, if the State elects to exempt retail sales of newspapers. Appellant and its amici further argue that as long as Arkansas has chosen to exempt retail sales of a few magazines, Arkansas is obliged to exempt retail sales of all magazines, including that of Appellant. The thrust of these arguments is that a State must either impose sales taxes upon sales of all publications or upon none. Appellant's and amici's arguments are grounded upon the First Amendment to the United States Constitution.

Appellant and its amici rely upon the cases of *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) and *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983) to support their contention that the Arkansas sales tax structure violates First Amendment guarantees. However, these cases are readily distinguishable from the case at hand.

In *Grosjean*, this Court held that a Louisiana license tax, imposed upon all newspapers with more than 20,000 weekly circulation, violated the First Amendment. The tax, single in kind, was enacted within the context of a political atmosphere of retribution against the larger newspapers that had been critical of Senator Huey Long. This Court was careful to state that newspaper publishers were not "immune from any of the ordinary forms of taxation for support of the government." 297 U.S. at 250.

The Arkansas sales tax is an "ordinary form of taxation for support of the government." There is no evidence that this tax was enacted with the intent to punish any form or type of publication. The tax and the statutory exemptions for sales of newspapers and the few other types of publications are not based on size or circulation. Therefore, *Grosjean* does not support Appellant's position.

In *Minneapolis Star*, this Court held that a Minnesota "use tax" upon the cost of ink and paper components incorporated into newspapers to be sold at retail violated the First Amendment in two respects. First, the ink and paper tax was a differential tax imposed only upon the press; other producers of tangible personal property for retail sale were exempt from tax upon their costs of components. Therefore, the Minnesota ink and paper tax was not part of any generally applicable economic regulation. Since Minnesota offered no justifiable reason for such differential taxation of the press in comparison with other producers, the use tax was held to violate the First Amendment. 460 U.S. at 581-590.

Second, the ink and paper tax only applied to a few newspapers because of a $100,000 exemption for purchases of ink and paper. No other producers were offered similar tax exemption. Minnesota did not offer any justification for a tax structure which, because of this $100,000 exemption, only impacted upon a few newspapers. Therefore, this Court held that the effect of the $100,000 exemption violated the First Amendment. 460 U.S. at 592-3.

The Arkansas sales tax does not contain the infirmities of the Minnesota ink and paper tax. The Arkansas sales tax is a generally applicable tax structure, of which

tax upon the retail sales of Appellant's magazine is a part. The Arkansas sales tax is not a differential tax which singles out Appellant and a handful of others for taxation not accorded to most other sellers of tangible personal property.

In addition, the Arkansas sales tax does not exempt small (or large) publishers and is not based upon circulation. Retail sales of publications of the same type (newspapers and religious, professional, trade and sports publications) are not taxable. Retail sales of all other types of publications are taxable.

Appellant's contention that *Minneapolis Star* proscribes any attempt to classify publications by taxing some and exempting others misstates what this Court held. *Minneapolis Star* does preclude a State from discriminating against the same type of publication (newspapers) with the result that only a handful are taxable. The Arkansas tax structure does not produce that result. Most types of publications will be subject to the Arkansas sales tax; only a few types will not. Therefore, *Minneapolis Star* does not support Appellant's position.

Prior precedents will support the Arkansas sales tax structure. The mere fact that not all publishers are subject to the same economic regulation does not render that regulation, otherwise general in application, invalid under the First Amendment. *Regan v. Taxation With Representation of Washington,* 461 U.S. 540 (1983); *Mabee v. White Plains Publishing Company,* 327 U.S. 178 (1946).

In *Mabee,* this Court upheld an exemption of certain types of small newspapers from the Fair Labor Standards Act of 1938 while other types of small newspapers

and large newspapers were covered, in common with other business, by that Act. This Court distinguished *Grosjean* in that "There the press was singled out for special taxation and the tax was graduated in accordance with the volume of circulation. No such vice inheres in this legislation." 327 U.S. at 184. The Arkansas tax structure does not single out Appellant's publication for "special taxation" and the Arkansas sales tax classifies the publishers more equally than the economic regulation in *Mabee.*

In *Regan,* this Court held that, under the circumstances, First Amendment guarantees were not implicated where a non-profit organization within 26 U.S.C. § 501 (c)(3) was disqualified from attaining tax-exempt status because of its substantial lobbying activities even though veterans' organizations which engaged in substantial lobbying would be eligible for tax-exempt status. This Court viewed tax exemptions as "a form of subsidy that is administered through the tax system." 461 U.S. at 544.

The non-profit organization argued that "because Congress has chosen to subsidize the substantial lobbying activities of veterans' organizations, it must also subsidize the lobbying of § 501(c)(3) organizations." 461 U.S. at 547. The Court of Appeals had found that this classication was subject to the "strict scrutiny" equal protection test because that Court perceived that First Amendment rights were affected on a discriminatory basis. 461 U.S. at 548. This Court rejected the Court of Appeals view as suggesting "that strict scrutiny applies where Congress subsidizes some speech, but not all speech. This is not the law." 461 U.S. at 548.

In essence, *Regan* can stand for the proposition that not all who exercise First Amendment rights are entitled to be subsidized by government in the form of a tax exemption even if some are so subsidized. As long as government does not formulate obstacles to those who exercise First Amendment guarantees, does not treat the same situations differentially, and does not engage in censorial conduct, government is free to select tax exemptions, within the context of general economic regulation, as a matter of legislative grace. 461 U.S. at 549-550. The Arkansas tax structure does not produce these prohibited results.

If a State chooses to tax the retail sale of magazines and other publications, but not newspapers, and also imposes the tax upon most retail sales of tangible personal property, such tax structure constitutes a general economic regulation and not the unconstitutional differential taxation of the press. Also, if a State, such as Arkansas, chooses to tax the retail sale of most types of publications, but not newspapers and four narrow and isolated categories of publications, such tax structure constitutes a general economic regulation.

Arkansas has an appropriate justification for exempting retail sales of newspapers from its sales tax. A substantial method of marketing newspapers involves children (paperboys and papergirls). Under these circumstances, "requiring the sales tax to be paid on these transactions would place a great burden both on the vendors, whose age and lack of business experience would render it difficult to comply with the monthly reporting procedures required by the Act, and the Department of Revenue, which would be charged with policing these sales and enforcing payment of the tax." *Matter of the Assessment of Additional North Carolina and Orange County Use Taxes Against Village Publishing Co.*, 312 N.C. 211, 322 S.E.2d 155, 163 (1984), *appeal dismissed for want of a substantial federal question,* — U.S. —, 86 L.Ed.2d 710, 105 S.Ct. 2693 (1985). This method of marketing newspapers by minors is unique and is not associated with substantial sales of other publications or of tangible personal property in general.

In addition, these children would be required to keep adequate records so that the State could audit them and determine whether the proper amount of sales tax had been remitted. Yet, how could the State be expected to audit records of these minors who would have difficulty understanding such record keeping requirements? Such an audit could also be a traumatic and confusing experience for these youngsters.

Within the context of a generally applicable sales tax on retail sales of tangible personal property, it is difficult to discern what purpose is served by requiring the State to tax the retail sales of newspapers if the State elects to tax the retail sales of other publications in common with other retail sales of tangible personal property. Also, it does not make sense to require a State to exempt retail sales of all publications because of the practical difficulties justifying a tax exemption for newspaper sales. Yet, Appellant's position is that the tax status of all publications is dictated by the State's treatment of newspapers.

While newspapers may also be sold by adults, since substantial sales involve children, it is not unreasonable

for Arkansas to extend the sales tax newspaper exemption to all newspaper sales. Under such tax structure, all retail sales of newspapers would receive like treatment, a condition that obviously would not burden the First Amendment.

It is a reasonable exercise of legislative power to exempt religious publications from taxation. *Walz v. Tax Commission of City of New York,* 397 U.S. 664 (1970). Professional, trade, and sports publications differ substantially in kind and in purpose from the other types of publications that would be subject to the Arkansas sales tax. Therefore, Arkansas ought to be able to choose to subsidize these isolated types of publications by tax exemption. A contrary result would require an iron clad rule of subsidy of either all speech or of none, not in accord with *Mabee* and *Regan.* Appellant and its amici do not cite any cases which would dictate an "all or nothing" tax policy under the First Amendment.

The Arkansas sales tax structure, with respect to sales of newspapers and other publications, involves the reasonable exercise of legislative discretion. Sound reasons exist for the newspaper and isolated publication tax exemptions. Accordingly, the Arkansas sales tax structure does not violate First Amendment guarantees.

V. CONCLUSION

For the reasons spelled out above, the judgment of the Arkansas Supreme Court should be affirmed.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa
HARRY M. GRIGER
Special Assistant Attorney General
Hoover State Office Building
Des Moines, IA 50319
(515) 281-5164